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In the
Supreme Court of the United States

October Term, 1973

No. 73-1056

A & B TRANSFER, INC., et al.,
Petitioners,

v.

S. S. KRESGE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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January, 1974

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, A & B Transfer, Inc., et al., are several hundred motor carriers, Appellants in the Court below. Said Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 5, 1973. This Petition is directly related to the Petition for Certiorari filed in No. 73-669, entitled *Admiral-Merchants Motor Freight, Inc., et al. v. Aluminum Company of America* and involves exactly the same order of the Interstate Commerce Commission there in issue. Indeed, the majority in the Court below adopted the Seventh Circuit's determinations in the *Aluminum Company* cases as the foundation for the resolution reached.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. The opinion of the trial court which was affirmed is unreported. Both decisions are set forth in their entirety in Appx. D, attached.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 5, 1973. This petition for certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED[1]

1. Whether § 16(2) of Part I of the Interstate Commerce Act has been incorporated into the Motor Carrier Act so as to establish a private cause of action for enforcement of an I.C.C. "refund" order against motor carriers.

2. Whether an I.C.C. finding of "not shown just and reasonable" entered in a motor carrier rate-making proceeding is a sufficient predicate for post-shipment awards of damages to complaining shippers.

3. Whether motor carriers may be held to have "tacitly agreed" to deviate from effective increased tariff levels and thereby be deprived of effective defenses in suits for refunds of the increases where they assert: (1) that the past charges were affirmatively reasonable when tested upon the historic facts surrounding the traffic; and (2) that compliance with the contested I.C.C. refund language would result in confiscation; and (3) that the refund "order" is void.

---

[1] These are precisely the same questions presented in the *Alcoa* petition for certiorari, No. 73-669.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49:

§16(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

§305(g) Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this Title: *Provided*, That where the Commission, in respect of any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

STATEMENT OF THE CASE

This case involves a court's "enforcement" of an Interstate Commerce Commission refund order against motor carriers in a shipper's action for damages.

The facts and circumstances antecedent to the proceeding in the trial court and the Court below are substantially the same as those which preceded the court actions in No. 73-669, presently pending in this Honorable Court on petition for certiorari. During the course of a general revenue investigation proceeding, upon request of certain protestants (which had been acquiesced in by the motor carrier respondents), the I.C.C. granted a necessary continuance. The procedural order contained a refund mandate in the language of a condition. The carrier respondents to that proceeding filed a petition for reconsideration which was later withdrawn leaving the order stand as issued.

Following hearing, the I.C.C. entered its report and order finding the increased rates (which had become effective without suspension) "have not been shown to be just and reasonable" and ordered their cancellation. The Commission –

> . . . further ordered, That in accordance with the order entered herein on April 25, 1968, the respondents be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases herein found not shown to be just and reasonable. Appx. B(4).

The motor carriers sought further hearing directed at the refund language based upon tendered evidence concerning the actual experience of the carriers under the unsuspended rates. On August 29, 1969, the I.C.C., based upon the same evidence, permitted even higher rates to take effect on and after the date of cancellation of the investigated increases, but denied reconsideration or further hearing on the refund language. It further ordered:

> . . . that the respondents will hereinafter, in accordance with the said decision of June 5, 1969, make refund to shippers *presenting their claims to the carriers supported by paid freight bills or other appropriate evidence.* (Emphasis Added). Appx. B(5).

Upon further petitions by the carriers and by certain shipper protestants, the Commission denied the relevancy of reparations decisions to the order which it entered in the rate-making proceeding. Simultaneously, the protestants' prayer for (1) an accounting or (2) a self-executing pay-back order was denied.

> because the order of August 29, 1969, did not change the liability for making refunds, previously determined, but *appropriately placed the burden for supporting claims for refunds upon the shippers who paid the charges.* (Emphasis Added). Appx. B(6).

Later, the Commission

> Voted to authorize the General Counsel to state to the district court in a motion to dismiss the action (Civil Action No. C-2030) or other appropriate pleading, that the true basis of the shippers' right to a refund is their common law remedy for restitution . . .. Appx. B(7).

Certain of the motor carriers applied for injunctive relief to the three-judge court, continuing to maintain that the Commission was without authority to award refunds under Part II of the Act. Holding that the I.C.C. had no common law (321 F. Supp. at 358), or statutory (321 F. Supp. at 358) power to enter a refund order, and that as a procedural device it could not commend the Commission action (321 F. Supp. at 360), the three-judge court nevertheless refused to annul the refund order, because of the motor carriers' initial withdrawal of objection to the inchoate refund language contained in the I.C.C. order which had granted the continuance. *Admiral-Merchants Motor Freight, Inc. v. United States,* 321 F. Supp. 353 (D. Colo., 1971). This Court affirmed the three-judge dismissal of the Urgent Deficiencies Act suit and denied the motor carriers' petition for rehearing. 404 U.S. 802; 404 U.S. 987.

On May 15, 1970, Kresge commenced its action for enforcement. The jurisdiction of the trial court was invoked under 28 U.S.C. §1336. Although it had not been a party to

either the I.C.C. case or the direct appeal, shipper Kresge moved for summary judgment for damages. No freight bills or other evidence supporting claims had been filed in court or presented to the carriers; nevertheless, summary judgment "enforcing" the refund language was granted on April 21, 1972, the trial court ordering:

> A. That the representatives of defendants shall appear at the offices of plaintiff at 2727 Second Avenue, Detroit, Michigan within 30 days hereof to verify the amounts shown to be owing to plaintiff by way of paid freight bills.
>
> B. That these said defendants shall make payment to plaintiff within 45 days of this order of those amounts verified by the paid freight bills as aforesaid. Appx. D(1).

Upon appeal, the Sixth Circuit affirmed in a split decision. The majority adopted the rationale of the Seventh Circuit set forth in *Aluminum Company of America v. Admiral-Merchants Motor Freight, Inc.*, ____ F.2d ____, 42 U.S.L.W. 2072, 1973 F. Carr. Cas. para. 84,420 (7th Cir., 1973). (Petition for cert. pending – No. 73-669). Circuit Judge Miller dissented in the 2 to 1 resolution of the case because of the conflict of the majority position with *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959), and on the grounds that:

> Such a remedy certainly was not anticipated by Congress and this Court should leave to that body the determination of whether the rights and remedies of carriers and shippers under the Motor Carrier Act are to be changed.
>
> * * *
>
> By creating a statutory cause of action for the appellees, this Court may have opened a Pandora's Box that could be difficult to close. Appx. D(2).

REASONS FOR GRANTING THE WRIT

The great importance of the novel Sixth Circuit interpretation and construction of the involved sections of the Inter-

state Commerce Act is underscored by the direct and the potential ramifications of the decisions below in an enormous volume of related cases presently pending throughout the United States. Direct and substantial conflicts with prior rulings of this Court are presented. The manifest injustice of the results, coupled with the lack of uniformity in results to date, indicates the necessity for the exercise of this Court's powers of supervision and for prompt resolution of the issues presented.

1. *The case represents a direct repudiation of several of the principles in T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959).*

Essential to the determination that a claim would lie against motor carriers under §16(2) of Part I of the Interstate Commerce Act[2] was the holding that §16(2) had been incorporated by implication into the Motor Carrier Act through §305(g). Compare the *express* incorporation of §16(13) into Part II. 49 U.S.C. §304(d). In adopting the *Alcoa* rationale, the Sixth Circuit conceded the same contentions conceded by the Seventh Circuit that . . .

> (a) the legislative history of §305(g) is devoid of any such Congressional intent; (b) the Commission has made numerous attempts to influence Congress to pass legislation similar to Sections 8, 9, 13(1) and 16 to be added to Part II; and (c) there is not a single case in which Section 305(g) was utilized to create a cause of action by incorporation of Section 16. *Aluminum Company of America v. Admiral-Merchants Motor Freight*, 1973 F. Carr. Cas. para. 82,420 at p. 56223.

The rationale of the Seventh Circuit which was adopted purported to rely upon the "plain language" of Section 305(g).

---

[2]Part I, generally, regulates rail carriers and petroleum pipeline carriers except when the provisions thereof are expressly incorporated by a cognate provision of another part of the Act governing the activities of another type of carrier.

But that plain language had been unchanged since 1959, when this Court ruled:

> . . . §§13(1) and 16 of Part I give a shipper . . . the right . . . to enforce his reparation award in the courts, *and Part II contains no comparable provisions. T.I.M.E., Inc. v. United States*, 359 U.S. 464, 470, 471 (1959).[3]

The direct conflict between the rationale of the Seventh Circuit's decision adopted by the Sixth Circuit and the cited prior decision of this Court is express.

This is the issue upon which Circuit Judge Miller dissented. It would be difficult to improve upon Judge Miller's cogent reasoning on this point, without unnecessary elaboration at this stage. Petitioners, therefore, respectfully refer this Honorable Court to that countervailing opinion which is set forth in full in Appx. D-2.

One of the fundamental tenets of statutory construction and interpretation of the various Parts of the Interstate Commerce Act has been the principle of "*expressio unius est exclusio alterius*." See, *e.g.*, *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959); *McFaddin Express, Inc. v. Adley Corp.*, 363 F.2d 546, 547 (2d Cir., 1966), *cert. den.*, 385 U.S. 900 (1966); *Riss & Co. v. Ass'n of Amer. R.Rs.*, 178 F. Supp. 438 (D.D.C., 1959); *Consolidated Freightways Inc. v. United*

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[3]This ruling, in *T.I.M.E.*, was essential to the result therein reached If sections 8, 9, 13(1) and 16 had been in Part II by inclusion under §305(g), the shippers' contentions made in *T.I.M.E.* would have prevailed, for then the Circuit determination to remand to the I.C.C. would have been proper. But this Court concluded that the I.C.C. was without jurisdiction to resolve the questions of the past reasonableness of the charges involved. The *Davidson* portion of the *T.I.M.E.* appeals was almost duplicative of the historical background of these cases. See *Surcharges, New York State*, 62 M.C.C. 117 (1953); *United States v. Davidson Transfer and Storage Co.*, 259 F.2d 802 (D.C. Cir., 1958). *And*, the refund concept had been not only considered, but rejected in the *Davidson* portion of the *T.I.M.E.* case, a determination not affected by this Court's reversal on other grounds.

Truck Lines, Inc., 216 F.2d 543 (9th Cir., 1954), *cert. den.*, 349 U.S. 905 (1955); *New York Cent. R.R. v. United States*, 267 F. Supp. 619, 627 (S.D.N.Y., 1967); *aff'd per curium*, 388 U.S. 445 (1967); *United States v. Seatrain Lines, Inc.*, 329 U.S. 424, 430 (1947). That principle, which has been uniformly applied since the passage of the Motor Carrier Act in 1935, has been manifestly disregarded in the Circuit's creation of the new legal right which the majority opinion espouses.

> Such a remedy certainly was not anticipated by Congress and this Court [the Sixth Circuit] should leave to that body the determination of whether the rights and remedies of carriers and shippers under the Motor Carrier Act are to be changed.
> Circuit Judge Miller, Appendix D-2.

The elementary reversal of position with respect to the proper interpretation of the various parts of the Interstate Commerce Act adopted by the majority decision strikes at the roots of the comprehensive regulatory scheme painstakingly devised by Congress to regulate the motor transportation industry. It is respectfully submitted that the invocation of this Court's supervisory powers is warranted where rights and remedies "not anticipated by Congress" are judicially created.

2. *The decision below disregarded the intentions of the agency which entered the order "enforced".*

Virtually every aspect of a motor common carrier's business enterprise is exhaustively regulated by one of the most sophisticated agencies under one of the most sophisticated schemes for regulation ever devised. The Court below has not only gone beyond the perimeters of the scheme, but has, in fact, disregarded the express intent of the agency itself. The Interstate Commerce Commission:

> Voted to authorize the General Counsel to state to the district court in a motion to dismiss the action (Civil Action No. C-2030) or other appropriate pleading, that the true basis of the shipper's right to a refund is their common law remedy for restitution,

> and further authorized the General Counsel to advise the Commission's staff accordingly as a guide in answering correspondence and other inquiries from shippers; Commissioners Tuggle, Murphy, and Walrath voting in the negative; Commissioners Bush, Jackson, and Gresham not participating.
>
> Commissioner Tuggle suggested a defense to which Commissioners Murphy and Walrath agreed. Appx. B(7).

The Commission itself has steadfastly maintained that the unique refund language involved in this proceeding was not a self-executing order. *E.g.*, 6th Cir. Appx. 141a.

> The Commission pleaded –
>
> The refund which is the subject of the complaint in actuality is not a requirement imposed by the Commission under the Interstate Commerce Act. The Commission's findings create a factual setting for the assertion of a common law suit. . . . the Commission's order, however, is declaratory; it reflects the Commission's view of the equitable obligation of the carriers and their common law duty to make restitution. Actual refund may be obtained only at the suit of affected shippers asserting the common law cause of action of unjust enrichment or money had and received.
>
> This Court [in a direct review action] is not able to determine whether the carriers should or should not make restitution. That is a question to be determined in a suit brought by the affected shipper or shippers. In their absence, this Court is not able to exercise an equitable jurisdiction to determine restitution.
> 6th Cir. Appx. 89a.

The Commission itself insisted that even the proposed right to restitution was subject to defenses including contest over the

judicial facts which had not yet been explored by a judicial or quasi-judicial tribunal:

> COMMISSION'S FAILURE TO WEIGH EQUITIES IS NON-PREJUDICIAL SINCE [THE CARRIERS] WILL OBTAIN A TRIAL DE NOVO OF THE QUESTION OF RESTITUTION IN THE SHIPPER'S FORUM.
> 6th Cir. Appx. 138a.

The Commission recognized that the historic facts surrounding the particular shipments transported under the rates in question had never been investigated and that it was presently impossible to tell whether the carriers had *in fact* been unjustly enriched. 6th Cir. Appx. 171a, 140a, 141a.

Whether the Commission's belief that a common law right had survived the passage of the rate-making provisions of the Motor Carrier Act is or was correct or incorrect (compare, *e.g.*, *T.I.M.E., Inc. v. United States, supra*), it is obvious that that agency's expertise in the area has been disregarded in favor of a facile, but improvident resolution of the litigation. Surely, at the very least, the Commission's expressed determination that its refund language was not to be construed as self-executing *with respect to its own order* ought to have been given consideration below.

Stated succinctly, the result reached below requires the deviation by carriers from unsuspended rates and the payment of damages on particular shipments of freight without any judicial or quasi-judicial ascertainment that those charges were improper, unreasonable, or unlawful.

3. *Fundamental rights of confrontation and hearing were by-passed.*

There is, in this proceeding, a total vacuum of information regarding the specific shipments involved. Indeed, at no time did the trial court even have before it a definitive designation of the shipments upon which the plaintiff was relying in its action. Trial and defense on any basis were utterly foreclosed

by the trial court decree that some 400 motor carriers, at their expense, report to the offices of the plaintiff in Detroit within 30 days to ascertain the amounts in controversy and pay the same within 15 days thereafter. Indeed, the trial court's order affirmed by the majority of the Sixth Circuit, disregarded the express terms of the I.C.C. order which it purported to "enforce". The Commission's order explicitly provided that shippers must present their claims to the carriers supported by paid freight bills or other appropriate evidence. Appx. B(5).

The *fact* is that some 400 motor carriers have been required to return a substantial percentage of their revenues from a particular shipper over an extended period of time without any opportunity whatsoever to present the historic facts surrounding the particular shipments involved before any tribunal. *The shipments upon which the plaintiffs were claiming were not even known at the time the court entered its judgment.* Sadly, the result below undercuts the most fundamental of the individual rights thought to be preserved by the Federal Constitution. Due process of law is thought to preserve to individuals an opportunity to be heard and a trial of the *judicial* facts surrounding a controversy prior to being condemned. Here, the facts surrounding the shipments upon which claims were made have never been exposed to judicial scrutiny. The Commission had before it only projections of fact as to what would occur when the shipments were later transported. The evidence before the Commission was offered in the context of a general rate investigation proceeding in which the paramount issue was the need of the carriers for additional revenue. That test is made by sampling evidence derived from representative carriers and does not in any way necessarily relate to individual carriers' operating experience. The Commission concluded that the carriers had failed to show that the rates would be just and reasonable *for the future.* It did not conclude that any particular rates on any particular types of shipments were improper *when charged.* Furthermore, it did not ascertain whether or not the carriers (which were, during the course of the effectiveness of the rates, required to perform service at the effective tariff levels) would be deprived of just compensation if required to refund a

portion of those effective rates. But, based upon the inconclusive[4] "not shown" finding, the Commission refund language had the effect of retroactively (and until cancellation) prescribing a lower level of rates than had been in effect.

> They [the carriers] could not foresee that confiscatory restitution would be required or that confiscatory divisions would be prescribed; they were not bound, in advance of the Commission's findings and report, to set up a fear of transgression of their constitutional rights. Presumably the Commission would keep within the law.
> *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 370 (1936).

When the motor carriers involved attempted to present the available historic evidence to the Commission following the initial ruling, the Commission denied further hearing. Appx. B(5). Likewise, later, when 60 of the motor carriers appealed directly to the three-judge court in Colorado for relief and sought, *inter alia*, a reference to the Commission on the issue of confiscation, that tribunal found the issue not within its cognizance and held that the proceeding before it was not an enforcement proceeding. *Admiral-Merchants Motor Freight, Inc. v. United States*, 321 F. Supp. 353 (D. Colo., 1971).

The carriers were under compulsion to serve the public. They were under compulsion to do so at the effective tariff levels. They were then ordered by an arm of Congress to return a portion of the charges collected.

> As Congress itself could not be, so it cannot make its agent be, the final judge of its own power under the Constitution.
> *Baltimore & Ohio R.R. v. United States, supra*, 298 U.S. at 364.

* * *

---

[4]See *Atchison, Topeka & Santa Fe Ry v. Wichita Bd of Trade*, 37 L.Ed. 2d 350, 365, 41 U.S.L.W. 4905, 4909, at n. 9 (1973).

". . . when the taking has been ordered, then the question of compensation is judicial."
Id., 298 U.S. at 365.

* * *

The just compensation clause may not be evaded or impaired by any form of legislation. Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause. If as to the value of his property, the owner accepts legislative or administrative determinations or challenges them merely upon the ground that they are not made in accordance with statutes governing a subordinate agency, no constitutional question arises. But, when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it.
Id., 298 U.S. at 368, 369.

The decision below has undercut and set aside the explicit directives of this Court set forth in the *Baltimore & Ohio* decision, 298 U.S. 363 through 373. But even more fundamentally, damages have in this instance been awarded without judicial cognizance of the facts surrounding the incidents of transportation upon which the shipper has claimed that it was injured or damaged.

4. *The departure from established precedent and the usual course of judicial proceedings is extreme.*

The refund language, which was admittedly "not based on the Commission's statutory authority" has nevertheless been ordered enforced under a statute designed for the enforcement

of statutory orders entered under Part I against railroads in cases in which the historic facts have been tested by the Commission – reparations cases. The result is that the shippers have obtained, by court interference and indirection, what the Congress has withheld from the Commission power to grant – refunds. The Congress did not incorporate §15(7) of Part I of the Act into Part II.

> To permit a utilization of the procedure here sought by the Government would be to engage in the very "improvisation" against which this Court cautioned in Montana-Dakota [Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951)], in order to permit the I.C.C. to accomplish indirectly what Congress has not chosen to give it authority to accomplish directly.
> *T.I.M.E., Inc. v. United States,* 359 U.S. 464, 475 (1959).

In foreclosing all judicial contest, the Sixth Circuit majority ruled that the case of *Admiral-Merchants Motor Freight, Inc. v. United States,* 321 F. Supp. 353 (D. Colo., 1971) *aff'd per curium* 404 U.S. 802, *reh. den.* 404 U.S. 987, Appx. C(1), C(2), and C(3), operated as *res judicata* on the issues of validity and enforceability of the refund language as a procedural device. What that court actually said was:

> While we do not commend the procedure as one which should be or could be practiced [by the I.C.C.]; we do hold that the peculiar facts of this case, rising as they did, are such as to not justify the granting of the relief requested, namely annulment of the Commission's order and approval of the carriers' conduct. 321 F. Supp. at 360.

Thus, the three-judge tribunal did not hold the refund language a valid order or a valid exercise of procedural power. And it did not rule that that language was enforceable. To the contrary, it ruled that "The practical effect of this ruling is not before us since this is not an enforcement proceeding." 321 F. Supp.

at 360. That court did not affirm the Commission's refund language as it might have done, but rather, dismissed the complaint. Nor, of course, did this Honorable Court affirm the Commission's order. It simply affirmed the decision of the three-judge tribunal which had refused on equitable grounds to annul the order.

The quasi-estoppel concept applied by the three-judge court in a suit against the government is next transferred by the *res judicata* principle to the instant action below between private parties. Compare *United States v. Western Pac. R.R.*, 352 U.S. 59, 76 (1956). Again, the ruling undercuts substantially a time honored precedent forged by this Court through years of litigation, to the effect that equitable principles are not to be utilized in private litigation for the purpose of permitting deviations from effective rate levels. *E.g., Gulf, Colo. & Santa Fe Ry v. Hefley*, 158 U.S. 98 (1895); *Texas & Pac. Railway v. Mugg*, 202 U.S. 242 (1906); *Central Ky Nat'l Gas Co. v. R.R. Comm'n*, 290 U.S. 264 (1933); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939); *Arrow Transp. Co. v. Southern Ry*, 372 U.S. 658 (1963). And, the implied agreement (by withdrawal of objections) upon which the Sixth Circuit has implied an estoppel has long ago been rejected by this Honorable Court as a predicate for a damages award in *Texas & Pac. Ry v. Abilene Cotton Oil Co.*, 204 U.S. 426, 445 (1907) ("If the agreement had been made . . . the agreement would have been so completely void as to be impossible of enforcement.")

The decision of the majority in the Sixth Circuit lays the groundwork for the utter destruction of the principle of uniformity of rates which is one of the cornerstones of motor carrier regulation. The suit below has resulted in an order to pay (unascertained) damages.

> If a shipper could recover . . . damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that

> each of these might bring a similar action . . .. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.
> *Keogh v. Chicago & N.W. R.R.*, 260 U.S. 156, 163 (1922).

What has occurred in the present series of cases is precisely what was forecast in *Keogh*. Some shippers have been granted relief; some complaints have been dismissed; some shippers have been awarded interest and attorneys' fees; others have not; and the interest and fees award have been highly deviant *inter se*. See Appx. A. Resultantly, the net rates paid by the various shippers have completely lacked in uniformity.

This would not have occurred had the Court below compelled the shippers to pursue their statutory right – created in 1965 – the right to reparations against motor carriers under 49 U.S.C. §304a. Properly instituted, such proceedings would have tested the past charges on an historic basis prior to the entry of findings and damage awards, if any. Then, the Commission would have had an opportunity to review the particular shipments of freight upon which the shippers were claiming to ascertain whether or not the charges which had been assessed in the past were reasonable. Such a finding has been held, previously, essential to an award of damage. See *Mitchell Coal and Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247, 249 (1913); *Texas & Pac. Ry v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry*, 284 U.S. 370 (1932); *Baer Bros. Mercantile Co. v. Denver & Rio Grande W. R.R.*, 233 U.S. 479, 486-89 (1914); *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U.S. 654 (1931); *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94 (1915); *Boston & Maine Ry v. Hooker*, 233 U.S. 97 (1914); *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924); *Louisville & Nashville Railroad v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Pennsylvania R.R. v. International Coal Min. Co.*, 230 U.S. 184 (1913); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939). And, it is entirely possible, upon such reference and review by the Commission, that it might find the *shippers'*

claims unsupported, because *they* are unable to show that the rates, when charged, were affirmatively unjust and unreasonable. See, *e.g., Feinstein v. New York Central R.R.*, 159 F. Supp. 460 (S.D. N.Y., 1958); *Wm. N. Feinstein & Co. v. New York Cent. R.R.*, 313 I.C.C. 783 (1961); *Wm. N. Feinstein & Co., Inc. v. United States*, 209 F. Supp. 613 (S.D. N.Y., 1962); and *Wm. N. Feinstein & Co. v. United States*, 317 F.2d 509 (2d Cir., 1963), in which this precise sequence occurred.

The departures from the statutory scheme and the uniform interpretation and application of that scheme as applied to motor carriers and the creation of the right to enforce the Commission's unauthorized "procedural device" is unprecedented beyond this and other cases related to the order in issue. The action of the lower Court throws into substantial doubt many of the predicates upon which the transportation industry relies and which the shipping public assumes in engaging in the nation's movement of freight. The split decision below not only unsettles settled precedent, but creates new rights and purports to resolve important questions of federal law which have not been, yet certainly should be, settled in this Honorable Court.

This case is the second to reach this Court out of dozens involving enforcement of the same Commission order. See Appx. A. In prior similar instances this Court has accepted the case. *E.g., Federal Trade Comm'n v. Jantzen, Inc.*, 386 U.S. 228, 229, (1967).

WHEREFORE, premises considered, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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January, 1974

APPENDICES

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
Mueller Co. v. United Buckingham Freight Lines	Cir. Ct., 6th Jud. Distr. Macon County Ill. 70-LM-264	1	1	8	–	–	Process Not Yet Served
Amana Refrigeration, Inc. v. Bruce Transfer (Consol.)	U.S.D.C. No.D. Iowa, Cedar Rapids Div. 70-C-13-CR 70-C-14-CR 71-C-19-CR 71-C-21-CR	4	3	23	Summary Judgment for PS. Costs, Fees (100% of award) 4% Interest from 10/12/71. [unreported]	8th Cir. 73-1507 73-1508 73-1509 73-1510 (Consol.)	Briefed in Circuit.
Liberty Glass Co. v. Arkansas Best Freight Systems, Inc.	U.S.D.C. No.D. Okla. 70-C-187 thru 191	5	1	5	Action To Be Dismissed with Prejudice.	–	Settled.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
Liberty Glass Co. v. Western Gillette Inc.	Dist. Ct. for Creek County, Okla. C-70-140 (Consol.)	14	1	14	Action To Be Dismissed with Prejudice.	–	Settled.
American Crystal Sugar Co. v. Indianhead Truck Lines	U.S.D.C. D. Minn., 4th Div. 4-70 Civil 226	1	1	10	Summary Judgment for P., Costs, Fees, 6% interest from 6/5/69. 351 F.Supp.102 359 F.Supp.741	8th Cir. 73-1580	• Motion to consol. granted. • Partially Briefed in Circuit.
Land O'Lakes v. United Buckingham Freight Lines, Inc.	U.S.D.C. D. Minn., 4th Div. 4-71 Civil 221 thru 238 & 240	19	1	19	Same	8th Cir. 73-1581	

Container Corp. v. Hart Motor Express, Inc.	U.S.D.C. D. Minn., 4th Div., 4-71 Civil 264	1	2	6	Same	8th Cir. 73-1682	• Consolidation of these cases with all other related 8th Cir. cases for argument has been granted
United States v. Admiral-Merchants Motor Freight, Inc.	U.S.D.C. D. Minn., 4th Div. 4-71 Civil 189	1	1	27 (See note 1)	Summary Judgment for P., Costs and interest at 4% from 6/5/69. [unreported]	8th Cir. 73-1670	
United States v. Arkansas Best Freight System, Inc.	U.S.D.C. No.Dist. Tex. Ft.Worth Div. 4-1739	1	1	21	Summary Judgment on liability for P. [unreported] [no opinion]	—	To be tried on issue of damages. (Not yet set).

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
United States v. Burlington Truck Lines, Inc.	U.S.D.C. W.Dist. Mo. W. Div. 19339-4	1	1	12	Judgment for P. Costs & 4% interest from 5/4/71. 356 F.Supp.582	8th Cir. 73-1202	• Consolidated in 8th Cir.
Western Electric Co. v. Burlington Truck Lines, Inc.	U.S.D.C. W.Dist. Mo. W. Div. 18471-4	1	1	10	Judgment for PS. Costs, Fees, 6% interest from 6/25/70. [unreported]	8th Cir. 73-1200	• Partially Briefed
Proctor & Gamble Co. v. Ideal Truck Lines	U.S.D.C. W.Dist. Mo. W. Div. 18829-4	1	2	3	Judgment for PS. Costs, Fees, 6% interest from 8/12/70 355 F.Supp.547	8th Cir. 73-1201	

Proctor & Gamble Co. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No.Dist. Ill., No. Div. 71-C-258	1	3	32	–	–	Stayed. Stipulated on outcome of P.G.C. appeal (Now in 8th Cir.) At issue.
Proctor & Gamble Co. v. Burlington Truck Lines, Inc.	U.S.D.C. No.Dist. Ill., No. Div. 71-C-1012	1	3	2	–	–	Same.
Sweetheart Cup Corp. v. Advance United Expressways, Inc.	U.S.D.C. No.Dist. Ill., No. Div. 71-C-1020 71-C-1021	2	2	48	–	–	Same.
Proctor & Gamble Co. v. Western Trucking Co.	U.S.D.C. E. Dist. Mo. E. Div. 70-C-578(1)	3	1	1	–	–	Same.
Western Electric Co. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 70-C-1531	1	1	66	–	–	Inactive. Will probably follow outcome Kansas City Western Electric case. (Now in 8th Cir.) At issue.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
Container Corp. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No.D. Ill. E. Div. 71-C-996	1	2	84	Judgment for Ds. [unreported]	7th Cir. 72-1646	Reversed. Petition for Certiorari in January, 1974.
Montgomery Ward & Co., Inc. v. Anderson Motor Services, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-2019	1	1	33	Transfer of venue from W.D. Mo. 339 F.Supp.713	–	Inactive pending resolution of Container Corp. case immediately above. At issue.
Bemis Co., Inc. v. Burlington Truck Lines, Inc.	U.S.D.C. No.Dist. Ill. E. Div. 70-C-1580	1	5	17	Summary Judgment for Ps. [unreported] fees, but no costs or interest.	7th Cir. 73-1695	Appeal dismissed. Settled.

Bemis Co., Inc. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. D.Minn, 4th Div. 4-70- Civil 237	1	5	32	–	–	Settled.
Federal Cartridge Corp. v. Ward Transfer, Inc.	U.S.D.C. D. Minn, 4th Div. 4-71 Civil 247	1	1	1	–	–	Settled.
S. S. Kresge Co. v. A & B Transfer, Inc.	U.S.D.C. E. Dist. Mich. So. Div. 34887	1	1	Approx. 200 - (approx. 200 dismissed with prejudice)	Summary Judgment for P. No interest or fees.	6th Cir. 72-1967	Affirmed. Petition for Certiorari pending.
Addison Products Corp. v. C. H. Rumpf & Sons	2d Dist. Ct. Michigan 4058-RK 4059-R	2	1	2	–	–	Set for trial 2/25/74.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
American Seating Co. v. Roche Transfer Line	61st Jud. Dist. Ct., Michigan. 51684	1	1	5	–	–	Stipulated on outcome of Kresge appeal.
L. E. Trotter & Assoc. v. Associated Truck Lines, Inc.	U.S.D.C. W. Dist. Mich. So. Div. G 254-71-CA (Consol)	19	1	19	–	–	Inactive. At issue.
Steel Case, Inc. v. Interstate Motor Freight System	61st Jud. Dist., Michigan 50609	1	1	6	–	–	Inactive. At issue.
Bergstrom Paper Co. v. C. W. Transport, Inc.	Dane County Cir. Court, Branch III, II Michigan 131-053 131-054	2	1	3	–	–	Stayed pending resolution of Kresge appeal.

American Can Co. v. C. W. Transport Inc.	U.S.D.C. W. Dist. Wisc. (Consol.) 70-C-166 thru 174	9	1	9	–	–	Stayed pending resolution of Kresge appeal.
Brockway Glass Co. v. Jones Truck Lines, Inc.	Muskogee County Dist. Ct., Okla. (Consol.) C-71-267 thru 271	5	1	5	–	–	Trial cont'd indefinitely.
Aluminum Co. of America v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No. D. Ill., E. Div. (Consol.) 70-C-1189 thru 1200.	11	1	11	Summary Judgments for P. Costs, attorney fees, 6% interest from 6/5/69. 337 F. Supp. 674 337 F. Supp. 683 342 F. Supp. 166	7th Cir. 72-1264 thru 1268 72-1505 thru 1512 (Consol.) (affirming trial court) __F.2d__ 1973 Fed. Carr.Cases ¶84,420 petition for reh. denied (unreported) Attorney fees allowed (unreported)	Petition for certiorari pending.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
Minnesota Mining & Mfg. Co. v. Admiral Merchants Motor Freight Inc.	U.S.D.C. Dist. Minn. 4th Div. 4-71 Civ 221	1	1	21	Summary Judgment on liability for P. 351 F.Supp. 102 359 F.Supp. 741	–	Trial on damages held 7/5/73. Pending resolution. Appeal virtually certain.
Bela Seating Co. v. Advance Transportation Co.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-2455	1	10	20 (9 to be dismissed)	Prior motions denied. 344 F. Supp. 854	–	Pending on motion for Summary Judgment.
Time, Inc. v. C. W. Transport Inc.	U.S.D.C. No. Dist. Ill. E. Div. 70-C-1952	1	1	3	Summary Judgment for plaintiff [unreported]	Not yet assigned 7th Cir.	Notice of Appeal filed 12/6/73

Levey Div., Cities Service Co. v. Abel Freight Lines, Inc.	U.S.D.C. No. D. Ill., E. Div. 71-C-1247	1	1	6 (22 dismissed)	Dismissed.	–	Settled.
Ceco Corp. v. Admiral-Merchants Motor Freight, Inc.	U.S.D.C. No. D. Ill., E. Div. 71-C-1217	1	1	38	–	–	Active. At issue.
Ryerson & Son, Inc. v. Advance United Express-ways, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1213	1	1	28	–	–	• Consolidated.
Ryerson & Son, Inc. v. Arkansas Best Freight System, Inc.	U.S.D.C. No.Dist. Ill. E. Div. 71-C-1334	1	1	7	–	–	•Active. •At issue.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
Coca-Cola Co. v. Murphy Motor Freight Lines, Inc.	U.S.D.C. No. Dist. Georgia Atlanta Div. 15144	1	1	24	–	–	Stayed until Jan. 1974. At issue.
Ryerson & Son, Inc. v. Chief Freight Lines, Inc.	U.S.D.C. E. Dist. Mo. E. Div. 71-C-317(2)	1	4	22	Dismissed with prejudice.	–	Settled
United Laboratories, Inc. v. Elgin Storage & Transfer Co.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1476	1	1	4	Dismissed with prejudice.	–	Settled.
Zenith Radio Corp. v. Be-Mac Transport Co.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1282	1	1	3	Dismissed with prejudice.	–	Settled.

Jones & McKnight Steel, Inc. v. Chief Freight Lines, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1218	1	1	22	Dismissed with prejudice.	–	–
Jones & McKnight Steel, Inc. v. Chief Freight Lines Co.	U.S.D.C. Dist. Minn. 4th Div. 4-71-Civ. 249	1	3	22	Dismissed with prejudice.	–	–
F & B Mfg. Co. v. Be-Mac Transport Co., Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1245	1	1	5	Dismissed with prejudice.	–	–
Kendall Co. v. All American Transport, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 70-C-1202	1	1	6	–	–	Inactive. Probable settlement. At issue.
Meredith Corp. v. All American Transport, Inc.	U.S.D.C. No. Dist. Iowa Central Div. 11-362-C-2	1	1	14	–	–	Same.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
Lennox Industries, Inc. v. Western Transp. Co.	Dist. Ct. for Marshall Iowa 31446 thru 31451 & 31683	7	1	7	–	–	Inactive. At issue.
Lennox Industries, Inc. v. Bruce Motor Freight, Inc.	Dist. Ct. for Polk County, Iowa Law Nos. 1173 thru 1175	3	1	3	–	–	Inactive. At issue.
American Home Products Corp. v. A&B Transfer Co., Inc.	U.S.D.C. No. Dist. Ill. E. Div. 70-C-1562	1	8	129	Motion for Summary Judgment denied. [unreported]	–	• Consolidated before same judge.

Abbott Laboratories v. Advance United Expressways, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1236	1	39	110	Same	—	• Motion to reconsider, etc. pending.
Appleton Electric Co. v. Advance-United Expressways, Inc.	U.S.D.C. No. D. Ill. E. Div. 70-C-1427	1	1 plus approx 200,000 class members	17 plus approx 1400 class members	Classes defined [unreported] Summary Judgment on liability for Ps [unreported] Order notices to Ds [unreported] Order Discovery of Ps names & addresses [unreported]	7th Cir. 73-1323 (Appeal dismissed without prejudice) [unreported] 72-1201 (petition for Prohibition denied) (unreported) 73-1665 (1292(b) appeal allowed)	• Active in Trial Court. • Motion to add numerous Ps & Ds undecided. • Motions pending. •Interlocutory Appeal • Briefed and argued in 7th Circuit.

NOTES TO SYNOPSIS

1. Barber Transportation, Inc., an included defendant, on its own behalf only, has filed a motion for rehearing in the District Court. The motion is submitted on affidavits and has been argued. Barber has not yet filed notice of appeal, therefore.

Appendix B (1)

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, D.C. 20423

Susp. -47380
March 29, 1968

NOTICE:

Upon petitions for reconsideration of the action of the Board of Suspension in declining to suspend, the entire Commission accepted the case upon referral from Appellate Division 2 and voted today not to suspend but to investigate in Docket No. 34971, *Increased Rates and Charges, From, To and Between Middlewest Territory,* protested schedules naming increases in motor common carrier class and commodity rates, minimum charges per shipments, and other charges including accessorial charges, between points in Middlewest territory, and between points therein *and* points in Central states and southwest territories, published in Supplements 2 and 6 to MF-ICC 541, and in numerous other tariffs of Middlewest Motor Freight Bureau, Agent, Kansas City, Mo., to become effective April 1, 1968, and later; and by order, to set forth procedures as to the nature of the evidence to be required of all parties of interest.

H. NEIL GARSON,
Secretary

SERVICE DATE
APRIL 2, 1968

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 29th day of March, 1968.

NO. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

There being under consideration the matter of increased class and commodity rates and charges, and rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce of shipments within middlewest states, and, between middlewest *and* central and southwest states and Alaska and Canada, as set forth in the following:

MIDDLEWEST MOTOR FREIGHT BUREAU, AGENT
MF-ICC 509:
In SUPPLEMENT 71, ITEM GI-68 except insofar as it would apply in connection with Item 10380 series;

MF-ICC 512:
In SUPPLEMENT 49, ITEM GI-68 except insofar as it would apply in connection with Item 7700 series;

MF-ICC 541:
SUPPLEMENT 2;
SUPPLEMENT 6;

MF-ICC 55:
SUPPLEMENT 42;

or as the same may be amended or reissued;

And all other tariffs, supplements or schedules of the above named agent, not designated in this order, inso-

far as they contain the same provisions or provisions of the same or similar import, or rates and charges incorporating increases the same as, or similar to, those set forth in the aforementioned tariffs or under investigation by reason of this order;

It appearing, That upon consideration of the tariff schedules, and protests thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules or regulations and practices that are unjust and unreasonable, in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges, rules, regulations and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

And it is further ordered, That the carriers parties to the said schedules, be, and they hereby, made respondents to this proceeding; that copies of this order be served upon the said respondents; and that notice of this proceeding be given the public by posting a copy of this order in the office of the Secretary of the Commission.

By the Commission.

H. NEIL GARSON,
Secretary

(SEAL)

Appendix B (2)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

Service Date

April 4, 1968

Increased Rates and Charges, From, To, and Between Middlewest Territory

Present: Laurence K. Walrath, Commissioner, to whom the matter which is the subject of this order has been referred for action thereon.

It appearing, That by order of the Commission dated March 29, 1968, in the above-entitled proceeding, an investigation was instituted into and concerning the lawfulness of the rates, charges, and regulations contained in the schedules described in said order,

And it further appearing, That in order that consideration be given to all factors which may bear upon a proper determination of the issues, including the question whether the resulting rates would be just and reasonable, it is deemed appropriate in the public interest that the information specified below be included in the record to be developed in this proceeding; and good cause appearing therefor:

It is ordered, That respondents be, and they are hereby, notified and required to submit information and supporting data which shall include, among other things, actual expense and revenue data (including anticipated expense and revenue data to show the effect of the proposed increase or decrease) and operating ratios specifically related to the

traffic and carriers involved, over-all operating ratios, detailed data to establish the representative nature of the carriers used, and in addition, all pertinent evidence and supporting data for the individual representative carriers as they relate to their over-all operations, and specifically to the traffic and territories involved.

It is further ordered, That the Commission will take official notice of all the respondent carriers' financial statements on file with the Commission.

It is further ordered, That the traffic studies to be submitted shall represent the most current period possible, and that they shall be based upon actual operations conducted during identical periods of time for each carrier; that the traffic studies shall be shown to be representative of the traffic covered by the rate proposal; and that the traffic study be costed out and operating ratios determined by the individual weight brackets included within the rate proposal. If the two carrier groups described below under the development of costs are used, the traffic study shall be similarly separated. The revenues and costs for both groups shall also be totaled and operating ratios developed.

It is further ordered, That respondents shall produce evidence showing the total revenue earned for the services performed under the bureau's tariffs here under investigation for the most recent annual reporting period.

It is further ordered, That the cost study shall be based upon the most current annual reporting period adjusted to date. The costs may be developed for those carriers subject to the requirements for allocation of expenses between line haul and pickup and delivery in 49 C. F. R. Part 182, Instructions 27 and 9002, whose total amount of revenue derived under the bureau's tariffs collectively is 75 percent or more of the total revenue derived by all carriers participating in those tariffs. If those instruction 27 car-

riers' revenue is less than 75 percent of the total, then all of the instruction 27 carriers should be used. These study carriers shall be selected from the participating carriers in descending order beginning with the carrier deriving the greatest dollar amount of revenue from those tariffs. Unit costs are to be developed separately for (1) those carriers who earn 50 percent or more of their revenues under the tariffs involved and (2) those carriers who earn less than 50 percent. If factors similar to those published in appendix A to Highway Form B for the above two groups of carriers are not available, the published factors for the applicable territory based on the latest study are acceptable in the development of the unit costs.

It is further ordered, That both the cost study and the traffic study be adequately supported by working papers to permit a complete check of the procedures followed and the results obtained.

It is further ordered, That respondents shall produce evidence of the sum of money, in addition to operating expenses, needed to attract debt and equity capital which they require to insure financial stability and the capacity to render service. This evidence should include, without limiting the evidence that may be presented, particularized reference to the respondents' reasonable interest, dividend, and surplus requirements; and experienced, projected, and needed rate of return on depreciated investment in transportation.

It is further ordered, That all Class I and II motor carrier respondents shall submit detailed data regarding carrier-affiliate financial and operating relationships and transactions including, with respect to any and all individuals, partnerships, and corporations affiliated with respondents, when such transactions individually or in the

aggregate amount to $2,500 or more during the year 1967, the following information:

1. Name of each affiliate from which respondent, during the year 1967, acquired, leased or purchased lands, buildings, equipment, materials, supplies, parts, tires, tubes, gasoline, oil, or other property or services used by respondent in its operations as a motor common carrier.

2. Kinds of property or service which each affiliate supplies to respondent.

3. Basis of charges for property or services supplied by affiliate to respondent including the base and rate for rental charges.

4. Total charges by each affiliate to respondent during the year 1967 for:

   a. Lease of vehicles.
   b. Lease of terminals.
   c. Lease of other property.
   d. Pickup and delivery of shipments.
   e. Repair and servicing of vehicles.
   f. Management, accounting, financial legal, purchasing, or traffic solicitation services.
   g. Property sold by affiliate to respondent.

5. If the affiliate derives revenue from the sale or lease of property or from services through transactions with persons other than respondent, indicate the percentage of the revenue of such business to the total revenue of the affiliate in the year 1967.

6. A copy of the income statement for each affiliate for the year 1967 and the latest period of 1968 for which an income statement is available.

7. A statement listing the amount of wages, salaries, bonuses, and other compensation paid by the affiliate in 1967 to any individual who is also a respondent or an officer, director or substantial stockholder of a respondent; or the wife or close relative of a respondent or officer, director or substantial stockholder of a respondent.

8. The term "affiliate" as used in this order means:
   a. Any individual who is also a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent, or of an officer, director, or substantial stockholder of a respondent.
   b. Any partnership in which one of the partners is a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent; or of an officer, director, or substantial stockholder of a respondent.
   c. Any corporation whose stock is wholly or partly owned by a respondent; by an officer, director, or substantial stockholder of a respondent; or by the wife or close relative either of a respondent or of an officer, director, or substantial stockholder of a respondent.
   d. Any corporation which exercises control over the operations or finances of respondent.

It is further ordered, That all of the required data specified in this order shall be based upon and reflect at least the 1967 annual reporting period.

It is further ordered, That the Department of Transportation and the General Services Administration be, and they are hereby, notified and requested to submit, as part of their presentation, evidence which will (1) adequately support the allegations contained in their protests before the Board of Suspension including data showing the productivity of respondents, any increase in such productivity for at least the calendar year 1967, and the labor costs per unit of productivity; (2) show what financial indicators should be considered by the Commission in making its decision in this proceeding; (3) show to what extent the Commission should consider operating ratios, return on invested capital, and rate of return on stockholders' equity,

in determining the revenue needs of respondents recognizing the differences which exist among the individual carriers both as to their financial conditions and their methods of operation; and, (4) should the Commission adopt any of these as criteria, show what percentage or percentages should the motor carrier industry be allowed in order to maintain a healthy financial condition.

It is further ordered, That the detailed information called for by this order shall be in writing and shall be verified by a person or persons having knowledge thereof; that such verified material shall be served on all parties of record on or before May 6, 1968, and at the same time, respondents shall file an executed original and 16 copies with this Commission, together with certificates of service in accordance with rule 1.22(a) of the General Rules of Practice. The information with respect to carrier affiliates may be served on the parties in summary form, if so desired.

It is further ordered, That all underlying data used in preparation of the material outlined above shall be made available in the office of the party serving such verified matter during usual office hours for inspection by any party of record desiring to do so; and that the underlying data shall be made available also at the hearing, but only if and to the extent specifically requested in writing and required by any party for the purpose of cross-examination.

It is further ordered, That anyone desiring to become a party of record to receive copies of the verified material of respondents to be filed in accordance with the procedure set forth above, must notify the Commission, in writing, on or before April 18, 1968. As soon as practicable after such date, a service list of all parties of record will be prepared and served by the Commission. Otherwise, any interested person desiring to participate in this proceeding may make his appearance at the hearing.

It is further ordered, That this proceeding be, and it is hereby, referred to Hearing Examiners Robert N. Burchmore and Richard McG. Wilkins for hearing commencing on May 20, 1968, at 9:30 o'clock a.m. District of Columbia Daylight Saving Time at the offices of the Interstate Commerce Commission, Washington, D. C.

It is further ordered, That this proceeding will not be the subject of an examiner's recommended report and order because due and timely execution of our functions requires an expedited decision and in addition, if the increases involved herein are not approved in their entirety, the shippers will be paying higher rates without any recourse to this Commission for relief.

It is further ordered, That a copy of this order be delivered to the Director, Division of Federal Register, for publication in the Federal Register as notice to all interested persons.

And it is further ordered, That, to avoid future unnecessary service upon those respondents, who, although participating carriers in the tariff schedules which are the subject of investigation herein, are not actively interested in the outcome of such investigation, subsequent service on respondents herein of notices and orders of the Commission will be limited to those respondents who:

(1) specifically make written request to the Secretary of the Commission to be included on the service list, or

(2) have appeared at a hearing.

Dated at Washington, D. C., this 3rd day of April, 1968.

By the Commission, Commissioner, Walrath.

H. Neil Garson

(Seal) *Secretary*

Appendix B (3)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 25th day of April, 1968.

No. 34971

Increased Rates and Charges, From, To, and Between Middlewest Territory

It appearing, That by order of the Commission dated March 29, 1968, in the above-entitled proceeding, an investigation was instituted into and concerning the lawfulness of the rates, charges, and regulations contained in the schedules described in said order:

It further appearing, That by order dated April 3, 1968, the Commission, among other things, directed the procedure which is to be followed in the above-entitled proceeding and required the submission of certain information and supporting data for the record on or before May 6, 1968, and scheduled the hearing to commence on May 20, 1968;

It further appearing, That by petition filed April 16, 1968, the Department of Transportation requests that the Commission order respondents to produce certain studies and underlying data prepared by Planning Research Corp., Midwest Research Institute and Pacific Research Corp.;

And it further appearing, That by request of April 12, 1968, the Department of Transportation and the General Services Administration requests that the procedural dates set forth in the order of April 3, 1968 be postponed for 90 days; and by letter dated April 22, 1968, respondents request that the time for filing and service of the information and data be extended to August 5, 1968, the hearing postponed to August 19, 1968, and that the hearing location be changed to Kansas City;

It is ordered, That the petition seeking the production of certain studies be, and, it is hereby denied, because the studies requested are not in the possession of respondents nor are they available to them;

It is further ordered, That the time for filing the requested information and supporting data be, and, it is hereby extended to August 5, 1968; that the hearing be, and, it is hereby postponed to August 19, 1968, conditioned upon respondents compliance with the refund provision ordered below; and that in all other respects, the Commission's order of April 3, 1968, remains in full force and effect (a decision will be made later as to the place of hearing);

And it is further ordered, That respondents be, and, they are hereby, ordered to make refunds to the shippers on any shipments moving after May 20, 1968, to the extent that the increases or any portion thereof under investigation herein are not approved by the Commission.

By the Commission.

/s/ H. Neil Garson
H. Neil Garson

(Seal) *Secretary*

Appendix B (4)

Served June 13, 1969

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

Decided June 5, 1969

Increased motor common carrier class and commodity rates and charges, between points in middle western territory and between points in that territory and points in Illinois, Central States and southwestern territories, and Alaska and Canada, found not shown to be just and reasonable. Schedules ordered canceled, refunds required and proceeding discontinued.

John S. Fessenden, Andrew N. Happer, J. D. Lawson, George D. Michalson, and Roland Rice for respondents.

John M. Agrey, S. W. W. Carr, John A. DuPont, J. I. Finsness, Gordon Ganka, Clarence D. Smith, E. J. Hanson, John J. C. Martin, Marvin H. Morse, Stanford G. Ross, Jeffrey N. Shane, Leonard M. Shinn, Eugene P. Springer, and Gleen F. Wilman for protestants.

REPORT AND ORDER OF THE COMMISSION

By the Commission:

By schedules which became effective on April 1, 1968, the motor common carriers, hereinafter called respondents, participating in tariffs published by the Middlewest Motor Freight Bureau, Inc. (hereinafter called the Bureau), established increased class and commodity truckload and less-than-truckload rates and charges, for application between points in middle western territory and between points in that territory and points in Illinois, Central States, and southwestern territories, and Alaska and Canada. Upon protests by various parties,[1] by order of March 29, 1968, we instituted an investigation, without suspension, into the lawfulness on the proposed schedules. The rates under investigation will be referred to herein as the proposed rates, and the rates in effect prior to April 1, 1968, will be referred to as the present rates.

By order of April 3, 1968, the proceeding was set for hearing on May 20, 1968, special procedures were prescribed and certain information was called for (see appendix A). The order also provided that the proceeding would not be the subject of an examiners' recommended report and order because the circumstances required an expedited decision. After the order was served, there were requests both from respondents and certain protestants for

1. The protestants who participated in the hearing were: The Drug and Toilet Preparation Traffic Conference; the Chamber of Commerce of Lincoln, Nebr.; the Traffic Bureau of Sioux Falls, S. Dak.; the Chambers of Commerce of Fargo and Grand Forks, N. Dak.; the North Dakota Public Service Commission; the Public Utilities Commission of the State of South Dakota; the United States Department of Transportation; and the General Services Administration (on behalf of executive agencies except the Department of Defense).

postponement of the hearing date. The hearing was postponed to August 19, 1968, by order of April 25, 1968, conditioned upon respondents' compliance with an order to make refunds on shipments after May 20 to the extent the increases were not approved.

After oral hearing, briefs were received from respondents and from the Department of Transportation (DOT), the General Services Administration (GSA), the Drug and Toilet Preparation Traffic Conference, and jointly from the Nebraska State Railway Commission and Lincoln Chamber of Commerce. DOT and the Traffic Conference take exception to rulings of the hearing examiners refusing to exclude from the record certain of respondents' exhibits which were served upon the parties by fourth-class mail rather than by first-class mail as required by rule 22 of our General Rules of Practice. The rulings are affirmed for the reason that the cited rule is not necessarily exclusionary in purpose or effect; appropriate relief for any delay caused by use of fourth-class mail, such as a grant of time to prepare their cross-examination, was not requested by the protestants. However, the respondents are admonished that such evasion of the service requirements wil not be tolerated in the future. The Traffic Conference excepts without argument to certain other evidentiary rulings. Examination of the entire record reveals no prejudice to the rights of the parties and no substantial error in the rulings of the examiners, which are therefore affirmed.

The adjustment here proposed consists of an increase of 5 percent in rates and charges applicable to shipments weighing less than 5,000 pounds and 3 percent in rates and charges applicable to shipments weighing 5,000 pounds or more. Not all of the Bureau's tariffs are under investigation.

Section 216(g) of the act imposes on respondents the

burden of showing the proposed rates to be just and reasonable. The sole justification offered by respondents for the proposal is their alleged need for additional revenues. They characterize the proposal as "the familiar type of across the board territorial revenue adjustment." The issues which they recognize are (1) whether the anticipated additional revenues are needed by the carriers, and (2) whether the carriers have been operated honestly, efficiently, and economically.[2] Respondents claim that they need additional revenues to meet anticipated increased costs resulting from higher wage rates and to improve the general financial condition which, they claim, the results of past operations indicate they must do.

Increased costs.—Respondents contend that their proposal is fully justified by increases in expenses which resulted from new wage rates effective April 1, 1968. They introduced cost and traffic studies for selected groups of carriers, which studies purport to show the effect which the increased expenses would have upon the carriers' profit margins, as reflected in operating ratios. However, the entire presentation is based upon a restatement of the carriers' 1967 expenses at the anticipated 1968 wage level,

2. Section 216(i) of the Interstate Commerce Act (referred to by respondents on brief) provides that, "In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transportation of passengers or property by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service."

and respondents failed to show either the amount of the wage rates or the process by which their expenses were restated to reflect such rates. Respondents' cost witness made the statement that total expenses had been restated to reflect the higher wage rates and that the resulting increase was 3.8 percent. But the witness had not been responsible for the restatement, which was made on an individual basis by certain member carriers, not fully identified on the record. Some of the individual statements were tendered as exhibits but were withdrawn because no witness could stand cross-examination concerning them. Respondents clearly failed to produce substantial compliance with the first paragraph of the order for proofs (appendix A) to the extent that it called for "anticipated expense and revenue data to show the effect of the proposed increase."

We take official notice of a second round of wage increases, effective April 1, 1968, under a National Teamsters Union contract, the first round having taken effect 1 year earlier. Such increased wage rates have been the subject of evidence presented to us in our investigations of proposed motor carrier rate increases in other territories. However, the effect of such wage rates upon the total expenses and unit costs of the carriers is not measurable without more information than the mere fact of the new wage rates. A reliable restatement of expenses is essential to any cost justification of increased freight rates. We recently (February 14, 1969) found not justified one territorial rate increase because the restatement of expenses which was offered in that case was not sufficiently representative and reliable. *General Increase, Middle Atlantic and New England*, called the *Middle Atlantic* case, 332 I. C. C. 820, 834-5. In the proceeding now before us the restatement has not been presented for our examination, and it is impossible for us to say what net effect, if any, the new wage rates

will have on the carriers' profit margins. The respondents have failed to show increased costs sufficient to justify their proposals in whole or in part.

While the foregoing conclusions render unnecessary a detailed analysis of respondents' cost and traffic studies, the nature of their presentation requires additional comment. Respondents used the studies to compare 1967 operating ratios with those ratios which would have obtained on 1967 traffic at the anticipated 1968 level of expenses, the projected ratios being shown at both present and proposed rate levels. The showing is summarized as follows:

Operating ratios for study carriers for years 1967 and 1968

Operating ratio based upon (1)	Shipments weighing less than 5,000 pounds (2)	Shipments weighing 5,000 pounds or more (3)	All affected traffic (4)
	Percent	*Percent*	*Percent*
Present rates and actual 1967 expenses	97.3	87.6	94.0
Present rates and projected 1968 expenses	101.3	90.3	97.5
Proposed rates and projected 1968 expenses	96.4	87.7	93.5

Even if accepted, respondents' showing suggests on its face that the proposed increase is out of line on shipments weighing 5,000 pounds or more. This is so because the proposed increase on such shipments, produces a profit margin reflected by present and proposed operating ratios of 87.6 and 87.7, while shipments under 5,000 pounds are so rated as to produce an operating ratio of 96.4, and indicate that the latter category is not bearing its fair share of total carrier costs. *Middle Atlantic* case, *supra*, page 830. Moreover, respondents' study shows that the effect of continuing

the present rates at 1968 cost levels on shipments over 5,000 pounds would be to produce a 90.3 operating ratio on such traffic. Respondents offer no evidence indicating that a ratio of 90.3 reflects a gross profit margin that is too low.

Respondents' financial condition.—Respondents contend that the financial results of their past operations show that they are badly in need of additional revenues. To develop such a showing, they submitted a 7-year financial study of all 142 class I and class II resident members of the Bureau.[3] They also offered the opinion testimony of a consulting transportation economist, a banker, and an investment banker. They assert that motor carriers need revenues sufficient to provide (1) for 4-percent annual growth of undepreciated plant, (2) for the effects of inflation in replacing old assets with new in the amount of 3 percent of book cost of undepreciated plant annually, and (3) for dividends at the rate of 7 percent of net worth. Their cost witness presented an analysis of the 7-year finances giving effect to those assumptions, and "required" additional revenues were constructed from the analysis. This presentation constitutes respondents' attempt to comply with that portion of the order for proofs (appendix A) which calls for "evidence of the sum of money, in addition to operating expenses, needed to attract debt and equity capital which they require to insure financial stability and the capacity to render service." Respondents on brief characterize the quoted requirement as the "most significant" part of the order, being directed to the revenue need which "is the real heart of this case."

The essence of respondents' method of synthesizing their claimed revenue needs for 1967 is revealed in the following

3. Class I carriers are those having annual gross revenues exceeding $1 million; class II carriers, exceeding $300,000. Resident members are those performing through service under the tariffs in issue.

table, which is taken from their exhibit and which deals with those carriers who derive 75 percent or more from the tariffs in issue.

Respondents' constructive 1967 revenue needs for 19 carriers deriving 75 percent or more of their revenues from issues tariffs

Line No.	Item	Source	Amount (000)
	Financial data:		
1	Working capital	Annual report (AR)	$ 3,589
2	Carrier operating property	AR	47,908
3	Gross investment	lines 1 and 2	51,477
4	Long-term debt	AR	15,991
5	Total net worth	AR	17,679
6	Interest expense	AR	909
7	Rate of interest	line 6 ÷ 4	5.7%
8	Net deductions (includes interest)	AR	715
9	Total operating expense	AR	113,106
	Constructive revenue need:		
10	Growth (1)	4 percent of line 3	2,059
11	Debt portion	½ of line 10	1,029
12	Equity portion	½ of line 10	1,029
13	Inflation (2)	3 percent of line 3	1,544
14	Yield (3) (dividends)	7 percent of line 5	1,238
15	Net income after taxes	lines 12, 13, and 14	3,811
16	Net income before taxes	line 15 ÷ .55	6,929
17	Interest on debt growth	lines 7 X 11	59
18	Net operating income need	lines 8, 16, and 17	7,703
19	Revenue needed	lines 9 and 18	120,809

Source.—Exhibit 27, appendix D, page 3, column 8

(1, (2), and (3) relate to correspondingly numbered items in text, above.

As shown in the above table, respondents in effect contend that the study carriers needed 1967 revenues of $120,809,000, whereas, as shown in appendix B hereto, their actual revenues were only $115,619,000. Respondents' study likewise constructs deficiencies for each previous year to and including 1963 (see appendix B). But examination of the synthesis compels the conclusion that the claimed need for additional revenues is untenable. The claimed revenue need includes, in line 12 of the above table, $1,029,000 as the equity portion of a 4-percent annual growth in gross investment, and the amount claimed constitutes the equity

itself rather than a return on investment sufficient to attract equity capital. The method is in sharp contrast with the treatment of the debt portion of growth, as to which respondents claim only the amount necessary to pay interest on the increased debt. There is no basis upon which we could fairly conclude that the rate paying public should supply the respondents' growth equity capital; and we reject the proposition. In this connection, it should be noted that the amount of the claimed equity portion of growth constitutes 27 percent of the total claim for net after tax income (above table, line 15 ÷ 12).

More than 40 percent of the claimed after-tax net income is based upon the proposition that respondents need revenues sufficient to provide for 3-percent annual inflation in the cost of replacing old equipment with new. However, the 3-percent annual inflation rate was applied to the gross investment, which includes cash and other working capital and depreciation reserves. This merely repeats in a different form the contention that the shippers should supply investment dollars, and would improperly impose a future cost on current rate payers. The record does not afford a basis for approving a claimed revenue need. Moreover, the inflation item includes the debt financed portion of gross investment, whereas the servicing of that debt is already recompensed by the item of net deductions.

The reasons stated above are not exhaustive but they require the conclusion that respondents' synthesis of revenue needs has not been justified.

Return on investment.—The single most important gauge of a motor carrier's ability to attract equity capital is its return of value over and above the values the investors have committed to the enterprise. Two significant measures are the rate of return on stockholders' investment, and the rate of return on assets. Accordingly, our order for

proofs (appendix A) called for "experienced, projected, and needed rate of return on depreciated investment in transportation" and for "dividend and surplus" requirements.

The revenues of the carrier group are examined in appendix B on the basis of the resulting return of after-tax net income in relation to net worth. As there indicated, respondents represent that the returns of after-tax net income on shareholders' equity ranged from 5.6 to 19.1 percent in the period 1963 through 1967, for the group of carriers deriving their revenues over 75 percent from the tariffs in issue. However, those ratios are based on shareholders' equity at yearend which in each year was greater than at the beginning of the year; a closer approach to the return on the equity for the actual period of operation is reached by taking the average of the equity at the beginning and end of the year. *Middle Atlantic* case, *supra*, page 844, footnote. 1.

Also, respondents introduced a study of affiliate data which indicates that the profits of affiliates which they attribute to the carriers are equivalent to a reduction of half a point in the study carriers' operating ratios. Absent more information on affiliates, an approach to the ascertainment of the effect of affiliates' profits on carrier returns would be to reduce carrier expenses by half a percentage point, and the appendix includes such an adjustment. The range of actual after-tax return on equity becomes 9.2 to 24.8, when such adjustments have been made.[4]

Appendix B also shows that the revenues claimed by respondents to have been required would have produced

4. Such adjustment gives no consideration to the net worth of the affiliates which is not included in the net worth of the reporting carriers, or to the fact that the affiliates' profits are before taxes; the effect of those items cannot be ascertained on this record.

net income after taxes ranging from 22.6 to 27.7 percent of net worth, those ratios ignoring the effect of affiliates. In this connection, respondents' cost witness projected the ratios as ranging from 9.9 to 11 percent, but those ratios are invalid because they relate revenue needs based on actual net worth to a hypothetical net worth calculated at 3.5 times the claimed revenues. The inevitable result was to understate the ratio, and the amount of the understatement is indicated by the adjusted ratios above.

Respondents offered no showing as to the return on their rate base, although the order for proofs called for evidence as to the "needed rate of return on depreciated investment in transportation." However, the proffered financial history reveals their net investment (working capital plus depreciated carrier operating property), which approaches the appropriate rate base. In the following table (extracted from respondents' exhibit 27, appendix D) the average of such net investment at the beginning and end of each year is shown with the return of net income before interest and income taxes, as experienced and as sought. (In this table the increase in return due to affiliate operations, if any, is ignored.)

Ratio of net income before income taxes and interest to rate base of carriers which derived 75 percent or more of their revenues from issue tariffs.

Year	Rate base	Net income before taxes and interest[1]		Rate of return	
		Actual	Sought	Actual	Sought
		(000)	*(000)*	*Percent*	*Percent*
1963	$17,542	[2]$1,345	$5,325	[2]7.7	30.4
1964	19,327	3,995	5,796	20.7	30.0
1965	21,721	3,460	6,441	15.9	29.6
1966	27,451	4,007	7,285	14.6	26.6
1967	29,372	2,707	7,838	9.2	26.7

1. Amount reported for net income before income taxes plus amount reported for interest.

2. Reported net income before taxes was less than after taxes.

This record does not furnish sufficient information to ascertain what is a reasonable return on a rate base for these motor common carrier respondents. However, we hold that no justification has been shown for a return of more than 25 percent on the rate base, as claimed.

In only 1 recent year has the composite return on equity of the study carriers been less than 14.9 percent: In 1967 it was 9.2 percent. All the evidence indicates, that 1967 was not a typical year. One of respondents' witnesses testified that 1967 was not a representative year because of unusual strikes that occurred. A witness for DOT testified that there was a drop in tons and ton-miles in 1967 which adversely affected productivity. Respondents' financial studies show that their profit margins improved substantially in the first quarter of 1968 as compared with the first quarter of 1967 (operating ratios of the 75-percent group went from 100 to 97.5) and this improvement took place prior to the effectiveness of either the proposed rates or the increased wages. Yet respondents offered no evidence or estimates as to traffic volume, past or prospective. Their projections simply assume 1968 traffic at the 1967 level. The record as a whole clearly precludes any approval of the proposals on the basis of the decline in earnings for 1967; furthermore, the evidence as to the earnings and financial condition of the respondents does not constitute a convincing showing of a need for higher rates.

The section 216(i) standards, which is set forth above, requires us to consider not only the need of the carriers for sufficient revenues but also the public need for adequate service at the lowest cost consistent therewith. The meeting point of those needs is sharpened at the present time by heightened dangers of inflation. It is not, therefore, enough to make an easy assumption that respondents' costs have gone up and that higher rates are warranted thereby. Our

duty requires closer examination and verification of alleged expenses, and ascertainment of their net effect, if any. This record does not afford sufficient information to perform that duty.

Carrier efficiency.—One other matter requires comment. Respondents called over 60 witnesses from individual carriers to testify generally to the practices followed and the improvements made for the purpose of increasing efficiency and reducing costs. The testimony is more impressive than that offered in a number of previous cases, and it is convincing as to the efforts made by these carriers to improve efficiency of operations. However, as above indicated, respondents have failed to present a sufficient showing with regard to the effect of the wage increase upon total expenses and unit costs of the carriers.

Ultimate Findings and Order

We find that the proposed increases have not been shown to be just and reasonable.

Commissioner Tuggle concurred in the result.

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel on or before July 21, 1969, the schedules described in the order entered herein on March 29, 1968, upon not less than 1 day's notice to the Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act.

It is further ordered, That, in accordance with the order entered herein on April 25, 1968, the respondent' be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent

that such charges included the increases herein found not shown to be just and reasonable.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

H. Neil Garson
Secretary

(Seal)

APPENDIX A

Excerpt from Commission's order of April 3, 1968, showing what information was sought therein.

It is ordered, That respondents be, and they are hereby, notified and required to submit information and supporting data which shall include, among other things, actual expense and revenue data (including anticipated expense and revenue data to show the effect of the proposed increase or decrease) and operating ratios specifically related to the traffic and carriers involved, overall operating ratios, detailed data to establish the representative nature of the carriers used, and in addition, all pertinent evidence and supporting data for the individual representative carriers as they relate to their overall operations, and specifically to the traffic and territories involved.

It is further ordered, That the Commission will take official notice of all the respondent carriers' financial statements on file with the Commission.

It is further ordered, That the traffic studies to be submitted shall represent the most current period possible, and that they shall be based upon actual operations conducted during identical periods of time for each carrier; that the traffic studies shall be shown to be representative of the traffic covered by the rate proposal; and that the

traffic study be costed out and operating ratios determined by the individual weight brackets included within the rate proposal. If the two carrier groups described below under the development of costs are used, the traffic study shall be similarly separated. The revenues and costs for both groups shall also be totaled and operating ratios developed.

It is further ordered, That respondents shall produce evidence showing the total revenue earned for the services performed under the bureau's tariffs here under investigation for the most recent annual reporting period.

It is further ordered, That the cost study shall be based upon the most current annual reporting period adjusted to date. The costs may be developed for those carriers subject to the requirements for allocation of expenses between line-haul and pickup and delivery in 49 CFR part 182, instructions 27 and 9002, whose total amount of revenue derived under the bureau's tariffs collectively is 75 percent or more of the total revenue derived by all carriers participating in those tariffs. If those instruction-27 carriers' revenue is less than 75 percent of the total, then all of the instruction-27 carriers should be used. These study carriers shall be selected from the participating carriers in descending order beginning with the carrier deriving the greatest dollar amount of revenue from those tariffs. Unit costs are to be developed separately for (1) those carriers who earn 50 percent or more of their revenues under the tariffs involved, and (2) those carriers who earn less than 50 percent. If factors similar to those published in appendix A to Highway Form B for the above two groups of carriers are not available, the published factors for the applicable territory based on the latest study are acceptable in the development of the unit costs.

It is further ordered, That both the cost study and the traffic study be adequately supported by working papers

to permit a complete check of the procedures followed and the results obtained.

It is further ordered, That respondents shall produce evidence of the sum of money, in addition to operating expenses, needed to attract debt and equity capital which they require to insure financial stability and the capacity to render service. This evidence should include, without limiting the evidence that may be presented, particularized reference to the respondents' reasonable interest, dividend, and surplus requirements and experienced, projected, and needed rate of return on depreciated investment in transportation.

It is further ordered, That all class I and class II motor carrier respondents shall submit detailed data regarding carrier-affiliate financial and operating relationships and transactions including, with respect to any and all individuals, partnerships, and corporations affiliated with respondents, when such transactions individually or in the aggregate amount to $2,500 or more during the year 1967, the following information:

1. Name of each affiliate from which respondent, during the year 1967, acquired, leased or purchased lands, buildings, equipment, materials, supplies, parts, tires, tubes, gasoline, oil, or other property or services used by respondent in its operations as a motor common carrier.
2. Kinds of property or service which each affiliate supplies to respondent.
3. Basis of charges for property or services supplied by affidavit to respondent including the base and rate for rental charges.
4. Total charges by each affiliate to respondent during the year 1967 for:
   a. Lease of vehicles.

b. Lease of terminals.
c. Lease of other property.
d. Pickup and delivery of shipments.
e. Repair and servicing of vehicles.
f. Management, accounting, financial, legal, purchasing, or traffic solicitation services.
g. Property sold by affiliate to respondent.

5. If the affiliate derives revenue from the sale or lease of property or from service through transactions with persons other than respondent, indcate the percentage of the revenue of such business to the total revenue of the affiliate in the year 1967.

6. A copy of the income statement for each affiliate for the year 1967 and the latest period of 1968 for which an income statement is available.

7. A statement listing the amount of wages, salaries, bonuses, and other compensation paid by the affiliate in 1967 to any individual who is also a respondent or an officer, director or substantial stockholder of a respondent; or the wife or close relative of a respondent or officer, director or substantial stockholder of a respondent.

8. The term "affiliate" as used in this order means:

a. Any individual who is also a respondent; an officer, director, or substantial stockholder of a respondent, or the wife or close relative either of a respondent, or of an officer, director, or substantial stockholder of a respondent.

b. Any partnership in which one of the partners is a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent; or of an officer, director, or substantial stockholder of a respondent.

c. Any corporation whose stock is wholly or partly owned by a respondent; by an officer, director, or substantial stockholder of a respondent; or by the

wife or close relative either of a respondent or of an officer, director, or substantial stockholder of a respondent.

d. Any corporation which exercises control over the operations or finances of respondent.

It is further ordered, That all of the required data specified in this order shall be based upon and reflect at least 1967 annual reporting period.

It is further ordered, That the Department of Transportation and the General Services Administration be, and they are hereby, notified and requested to submit, as part of their presentation, evidence which will (1) adequately support the allegations contained in their protests before the Board of Suspension including data showing the productivity of respondents, any increase in such productivity for at least the calendar year 1967, and the labor costs per unit of productivity; (2) show what financial indicators should be considered by the Commission in making its decision in this proceeding; (3) show to what extent the Commission should consider operating ratios, return on invested capital, and rate of return on stockholders' equity, in determining the revenue needs of respondents recognizing the differences which exist among the individual carriers both as to their financial conditions and their methods of operation; and (4) should the Commission adopt any of these as criteria, show what percentage or percentages should the motor carrier industry be allowed in order to maintain a healthy financial condition.

Appendix B (5)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

ORDER

Service Date

September 9, 1969

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 29th day of August, 1969.

No. 34971

Increased Rates and Charges, from, to and Between Middlewest Territory

Upon consideration of the record in this proceeding; the Commission's decision of June 5, 1969 (335 I. C. C. 142) requiring cancellation of the involved general rate increase and directing respondents, in accordance with an order herein of April 25, 1968, to refund to shippers increased rates collected on shipments moving after May 20, 1968; and the petition of respondents to vacate that portion of the order of June 5, 1969, requiring refund payments to shippers and request therein for reconsideration and/or reopening for further hearing filed on July 14, 1969; and the replies thereto filed by protestants Traffic Bureau of Sioux Falls on July 23, 1969, General Services Administration on August 4, 1969, jointly by Nebraska State Railway Commission and Lincoln Chamber of Commerce on August 4, 1969, jointly by Grand Forks Chamber of Commerce,

Chamber of Commerce of Fargo, and Public Service Commission, State of North Dakota, on August 11, 1969, Department of Transportation on August 18, 1969, and jointly by Drug and Toilet Preparation Conference and The National Small Shipments Traffic Conference, Inc., on August 18, 1969; and therefore:

It is ordered, That the petition be, and it is hereby, denied for the reason that sufficient grounds have not been presented to warrant granting the action sought; and that the respondents will hereinafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence.

By the Commission.

/s/ Andrew Anthony, Jr.
Andrew Anthony, Jr.
Acting Secretary

(Seal)

Appendix B (6)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

ORDER

Service Date November 6, 1969

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 27th day of October ....., 1969.

No. 34971

Increased Rates and Charges, from, to and Between Middlewest Territory

Upon further consideration of the record in this proceeding, including the Commission's decision of June 5, 1969 (335 I. C. C. 142) requiring cancellation of the involved general rate increase and directing respondents in accordance with an order herein of April 25, 1968, to refund to shippers increased rates collected on shipments moving during the specified refund period; and the order of August 29, 1969 denying prior petitions for reconsideration and vacation of the refund provision; and

It appearing, That on October 9, 1969, a petition for reconsideration of the decision as affirmed by the above-indicated denial order was filed by the respondents on the grounds that the instant petition is not successive but

properly lies because a new basis therefor has arisen by virtue of the Commission's decision in Ex Parte No. 249 (Sub-No. 1), *Informal Procedure for* Determining Reparation, 335 I. C. C. 403 (decided September 5 and served September 18, 1969);

And it further appearing, That a petition was also filed on October 9, 1969, by the Drug and Toilet Preparation Traffic Conference, Inc. (hereinafter referred to as the Conferences), seeking reconsideration solely of the said denial order of August 29, 1969, because it allegedly altered the method of refund payment from that set forth in the decision of June 5, 1969; wherefore:

It is ordered, That the respondents' petition be, and it is hereby, denied, because Ex Parte 249 (Sub-No. 1) is not relevant to the instant situation, wherein respondents had the burden of proving the lawfulness of the general increases.

And it is further ordered, That the Conferences' petition be, and it is hereby, denied, because the order of August 29, 1969, did not change the liability for making refunds, previously determined, but appropriately placed the burden for supporting claims for refunds upon the shippers who paid the charges.

By the Commission.

H. Neil Garson
Secretary

(Seal)

Appendix B (7)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

9485

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 18th day of June, 1970.

George M. Stafford,
Dale W. Hardin,
Kenneth H. Tuggle,
Rupert L. Murphy,
Laurence K. Walrath,
John W. Bush,
Virginia Mae Brown,
Willard Deason,
Donald L. Jackson,
Robert C. Gresham,
Commissioners.

—0—

Admiral-Merchants Motor Freight v. *United States*,
C. A. No. C-2030 (D. Colo.)
(G.C. Memo No. 140-70)

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY—No. 34971, 335 I.C.C. 142 (1969)

Voted to authorize the General Counsel to state to the district court in a motion to dismiss the action (Civil Action No. C-2030) or other appropriate pleading, that

the true basis of the shippers' right to a refund is their common law remedy for restitution, and further authorize the General Counsel to advise the Commission's staff accordingly as a guide in answering correspondence and other inquiries from shippers; Commissioners Tuggle, Murphy, and Walrath voting in the negative; Commissioners Bush, Jackson, and Gresham not participating.

Commissioner Tuggle suggested a defense to which Commissioners Murphy and Walrath agreed.

Appendix C (1)

IN THE UNITED STATES DISTRICT COURT
For the District of Colorado

Civil Action No. C-2030

Admiral-Merchants Motor Freight, Inc., Advance-United Expressways, Inc., All-American Transport, Inc., Badger Freightways, Inc., Barber Transportation Co., Bee Line Motor Freight, Brady Motorfrate, Inc., Briggs Transportation Co., Bruce Motor Freight, Inc., Burlington Truck Lines, Inc., Byers Transportation Company, Inc., C W Transport, Inc., Campbell "Sixty-Six" Express, Inc., Capitol Truck Lines, Inc., Cassell Truck Lines, Inc., Century Motor Freight, Inc., Chicago Kansas City Freight Line, Inc., Chippewa Motor Freight, Inc., Churchill Truck Lines, Inc., Clairmont Transfer Co., Crouch Bros., Inc., Crouse Cartage Company, Darling Transfer, Inc., Gateway Transportation Co., Inc., Glendenning Motorways, Inc., Graham Ship by Truck Company, Graves Truck Line, Inc., Green Bay-Chicago Lines, Gross Common Carrier, Inc., H & W Motor Express Company, Hart Motor Express, Inc., Hennis Freight Lines, Inc. of Nebraska, Hyman Freightways, Inc., Ideal Truck Lines, Inc., Mercury Motor Freight Lines, Inc., Mid-American Lines, Inc., Mid Continent Freight Lines, Inc., Middlewest Freightways, Inc., Midwest Motor Express, Inc., Minnesota-Wisconsin Truck Lines, Incorporated, Motor Transport Company, Murphy Motor Freight Lines, Inc., Navajo Freight Lines, Inc., Neuendorf Transportation Co., Orscheln Bros. Truck Lines, Inc., Premier Trucking Service Co., Raymond Motor Transportation, Inc., Ringsby Truck Lines, Inc., The Rock Island Motor Transit Company, J. L. Scheffler Transport, Inc., Sioux Transportation Company, Inc., Sturm Freightways, Inc., Takin Bros. Freight Line, Inc., Toedebusch Transfer, Inc., Twin City Freight, Inc., United-Buckingham Freight Lines, Inc., Werner Continental, Inc., Western Transportation Company, Witte Transportation Company, and Yellow Freight System, Inc., *Plaintiff's*,

vs.

United States of America and Interstate Commerce Commission, *Defendants*.

Appearances:

For the Plaintiffs:

George D. Michalson, Esq.
Post Office Drawer 647
Kansas City, Missouri 64141

Rice, Carpenter & Carraway

By: Roland Rice, Esq.
Suite 618, Perpetual Building
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Washington, D. C. 20004

Jones, Meiklejohn, Kehl & Lyons

By: Alvin J. Meiklejohn, Jr., Esq.
Arthur R. Hauver, Esq.
420 Denver Club Building
Denver, Colorado 80202

For the United States of America:

Walker B. Comegys, Esq., Acting Assistant Attorney General

By: John H. D. Wigger, Esq.
Department of Justice
Washington, D. C. 20530

James L. Treece, Esq.
United States Attorney
323 United States Courthouse
Denver, Colorado 80202

For the Interstate Commerce Commission:

Fritz R. Kahn, Esq., General Counsel

By: Leonard S. Goodman, Esq.
Associate General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

For the Intervenor Drug & Toilet Preparation Traffic Conference:

Belnap, McCarthy, Spencer & Hardy
By: Charles J. McCarthy, Esq.
Richard J. Hardy, Esq.
1750 Pennsylvania Avenue, N. W.
Suite 318
Washington, D. C. 20006
John J. Conway, Esq.
946 Metropolitan Building
1612 Court Place
Denver, Colorado 80202

Before Lewis, Chief Judge, United States Court of Appeals for the Tenth Circuit, Kerr and Doyle, District Judges.

MEMORANDUM OPINION AND ORDER

Doyle, District Judge

I. Facts

This is an action seeking judicial review of a Decision and Order of the Interstate Commerce Commission entered in that Commission's Docket No. 34971, *Increased Rates and Charges, From, To and Between Middlewest Territory*, 335 I. C. C. 397 (June 5, 1969), as modified by Order of August 29, 1969. Plaintiffs assert that insofar as that order purports to or does order them to refund certain portions of a disputed rate increase schedule, that portion of the order should be set aside and annulled, and the enforcement of it enjoined, as beyond the statutory authority and jurisdiction of the Commission.

The transactions leading up to the present controversy began when certain motor carriers of property, including plaintiffs herein, which were parties to and participated in

the tariffs of the Middlewest Motor Freight Bureau, Inc., filed and published schedules naming various increased rates and charges. These increases were scheduled to and did become effective on April 1, 1968. After various protests were filed to the increased rates, the Board of Suspension of the Interstate Commerce Commission declined either to suspend or investigate the increased rates and charges.[1] Upon reconsideration and referral to the entire Commission, it was ordered that an investigation be instituted into and concerning the lawfulness of said increased rates and charges. The Commission did not, however, order suspension of the new rate schedule.[2]

Thereafter, the Commission issued a number of procedural and intermediate notices and orders, including its Order of April 3, 1968,[3] specifying the evidence to be pro-

1. The matter at this stage was assigned Suspension Docket No. 47380.

2. Increased Rates and Charges, From, To and Between Middlewest Territory, I. C. C. No. 34971 (Order of March 29, 1968). The Relevant portions of Section 216(g) of the Motor Carrier Act, 49 U. S. C. § 316(g), provide:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle. . . . the Commission is authorized and empowered upon complaint of any interested party or upon its own initiative . . . to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect.

3. Exhibit B to the Complaint.

duced at a hearing before certain Hearing Examiners, which hearing was ordered to commence on May 20, 1968.

On April 12, 1968, the Department of Transportation and the General Services Administration, which agencies had protested the increases and had been notified and requested by the Commission to furnish certain evidence, requested that the procedural date set forth in the Order of April 3, 1968, be postponed for 90 days.[4] Other protestants apparently did not join in this request. By letter of April 22, 1968, respondents in the investigative proceedings, including plaintiffs herein, also requested "that the date provided in the order of April 3 be postponed for a period of 90 days so that respondents' evidence would be due on August 5, 1968, and the hearing, presently set for May 20, 1968, would be reset to commence on August 19, 1968. The reason for this request [was] the physical impossibility

4. Prior to any formal request for a continuance, an informal meeting was held in the office of the Deputy Director of the Commission's Bureau of Proceedings—Mr. A. L. Corbin. According to the affidavit of Mr. J. D. Lawson, Executive Vice President of Middlewest Motor Freight Bureau at the time, Mr. Corbin asked Mr. Lawson at that meeting whether, if a postponement were granted, the carriers would agree to pay refunds, if the rate increases were not ultimately approved by the Commission. Both Mr. Lawson and counsel for the Middlewest Motor Freight Bureau responded that they had no authority to enter into any such agreement on behalf of the carriers and further stated their belief that the Commission lacked statutory authority to require refunds or to impose a refund agreement as a condition to the grant of a postponement. Affidavit of J. D. Lawson, Appendix B to Reply Brief of Plaintiff. Although Mr. Lawson states that no party requested the refund provision, Mr. John M. Cleary, Esq., also present at that meeting, states that the shippers took the position that they would have no objection to the continuance, if they could be assured that at the end of the proceeding refunds would be made to the extent the rates collected are not shown to have been just and reasonable. Affidavit of John M. Cleary, Intervenor's Exhibit C.

for respondents to compile the required data within the time allowed by the order."[5] In response the Commission issued an order which initially set forth the refund provision in controversy in the case at bar:

> *It is further ordered,* That the time for filing the requested information and supporting data be, and, it is hereby extended to August 5, 1968; that the hearing be, and, it is hereby postponed to August 19, 1968, conditioned upon respondents compliance with the refund provision ordered below. . . .
>
> *And it is further ordered,* That respondents be and, they are hereby, ordered to make refunds to the shippers on any shipment moving after May 20, 1968, to the extent that the increases or any portion thereof under investigation herein are not approved by the Commission.[6]

Five days later, on May 1, 1968, respondents (including plaintiffs herein) petitioned the Commission for reconsideration of the Order of April 25, 1968. They challenged the refund provision on many of the same grounds urged now in the case at bar. Subsequently, however, they withdrew this objection to the refund condition, grounding it on the decision of the Commission in a similar petition, Docket No. 34978, *Pacific Inland Territory,* Rate Increases, 1968.[7]

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5. Letter from Mr. John Fessenden, Counsel for Respondents and Middlewest Motor Freight Bureau to Mr. Alvin L. Corbin of the I. C. C., April 22, 1968, Plaintiffs' Exhibit 1(b).

6. Order of April 25, 1968, Exhibit "C" to the Complaint.

7. Increased Rates and Charges, Pacific Inland Terr., 332 I. C. C. 845 (Feb. 13, 1969). According to Intervenor's Brief, respondents in that case refused to comply with a refund condition, and the Commission vacated the order granting a 90-day postponement of the hearing date. The Commission felt that respondents in that case should have been prepared and ready to submit evidence to prove the lawfulness of their proposed tariff changes when the sched-

They further stated that evidence in support of the rates in the Middlewest Territory case could not be compiled by the original hearing date of May 20, 1968. This left the order of April 25, 1968 standing as issued. Subsequent to this withdrawal of the Petition to Reconsider, several protestants in the proceeding advised the Commission by letter that they were not satisfied with a mere withdrawal of the objection to the refund provision, as any guarantee of compliance with the Commission's refund provisions.[8] These objections proved to be prophetic.

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ules containing those charges were filed with the Commission. *See also*, General Increase, Middle Atlantic and New England, 332 I. C. C. 820 (Feb. 14, 1969).

8. For example, the following letter was addressed to Mr. H. Neil Garson, Secretary, Interstate Commerce Commission, signed by Mr. J. A. DuPont, Manager, Transportation Department, Lincoln Chamber of Commerce, May 7, 1968 (Plaintiffs' Exhibit 1):

> Dear Mr. Garson:
>
> This Protestant is not satisfied that the Respondents' letter, dated May 2, merely withdrawing their May 1, 1968 petition for reconsideration, is any guarantee of compliance with the Commission's refund provisions of its April 25, 1968 order.
>
> . . . If the Protested rates and charges are ordered cancelled, we see a distinct possibility of the Respondents dragging the refund provision through every court in the land before making any actual refunds as contemplated by the Commission. Perhaps some sort of bond covering shippers' monies subject to possible refunds is in order.
>
> Your Protestant believes that the shipping public is entitled to a specific commitment from the Middlewest Motor Freight Bureau that they will abide by the Commission's refund provision paragraph in its April 25, 1968 order. Unless such a commitment can be obtained from the Respondents, it is our position that the earlier procedural dates prescribed in Docket No. 34971 on April 3, 1968, should be reinstated so that this important investigation may promptly proceed.
>
> Sincerely,

No action was taken with respect to this issue until after the postponed hearing on the merits at which time the Commission issued its decision in the matter. In its Report and Order of June 5, 1969, the Commission found that the increased rates and charges "have not been shown to be just and reasonable", ordered them cancelled, and "*further ordered*, That, in accordance with the order entered herein on April 25, 1968, the respondents be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases herein found not shown to be just and reasonable."[9]

Thereafter, the respondents filed a petition to vacate that portion of the Order of June 5, 1969, which required the payment of refunds, and sought reconsideration of the refund order and/or reopening of the subject proceeding for further hearing. Meanwhile, cancellation was made of the disputed increases on statutory notice, effective August 31, 1969, and simultaneously, on statutory notice, respondents filed new and higher increases of six per cent to become effective on September 1, 1969. Following various protests, the Board of Suspension declined to suspend or to investigate the new rate increases. On appeal, the entire Commission: (1) entered its order declining to suspend or investigate the September 1 increases, and (2) entered its order denying respondents' petition to reconsider and vacate the refund order. The Commission further ordered,

> that the respondents will hereinafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence.[10]

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9. Increased Rates and Charges, From, To and Between Middlewest Territory, 335 I. C. C. 142 (June 5, 1969).

10. Increased Rates and Charges, From, To and Between Middlewest Territory, I. C. C. No. 34971 (Order of August 29, 1969).

A second Petition for Reconsideration of the Order of June 5, 1969, as affirmed by the Order of August 29, 1969, was denied by the Commission by Order of October 27, 1969. Thus, the increased rates were collected from April 1, 1968 to August 31, 1969. The Order to Refund is, however, effective from May 20, 1968 to August 31, 1969.

II. Jurisdiction.

This being an action to enjoin or set aside an order of the Interstate Commerce Commission, jurisdiction is vested in the United States District Courts by 28 U. S. C. § 1336(a) and Section 17(9) of Part I of the Interstate Commerce Act, 49 U. S. C. § 17(9), the latter section being made applicable to Part II of the Interstate Commerce Act (Motor Carrier Act) by Sections 205(g) & (h) of the Motor Carrier Act, 49 U. S. C. §§ 305(g) & (h).[11] Jurisdiction of a three-judge district court is alleged under 28 U. S. C. § 2325, and such a court has been convened to hear the matter as provided by 28 U. S. C. § 2284.

The United States of America, as statutory defendant in this proceeding,[12] and the Interstate Commerce Commission (both defendants hereinafter referred to as the Government) have challenged the jurisdiction of this Court over the subject matter of this action and have challenged the propriety of a three-judge court.

It is to be noted though that the Government in questioning the jurisdiction of this Court to review the case did so as a preliminary matter. We have heard the case as a three-judge court, and the three participating judges have subscribed to the opinion and decision.

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11. *See also* Sections 10(a) & (b) of the Administrative Procedure Act, 5 U. S. C. §§ 702 & 703.

12. *See* 28 U. S. C. § 2322.

We are mindful that 28 U. S. C. § 2312 calls for a somewhat different review procedure in actions "for the payment of money or the collection of fines, penalties and forfeitures." However, we do not regard this case as an action for the payment of money. Its primary concern is the effort of the Commission to uphold and protect its jurisdiction.

It may possibly be that the decision of this Court will have some effect on the effort of the shippers here to obtain refunds. Nevertheless, the instant review is not to be classified as an action to enforce the payment of money or the collection of fines, penalties and forfeitures. The plaintiffs have brought the suit here seeking annulment of an order of the Commission. Because of the high importance of the case we feel duty-bound to entertain the suit and to determine it on its merits. We therefore reject these questions concerning our jurisdiction.[13]

III. Issue

We must decide whether an order of the Commission in which a rate increase is denied, which order directs repayment of interim rates, if determined to be invalid, and which refund order was entered by the Commission as a condition of granting an extension of time to the carriers at their request, is invalid and subject to a judgment annulling the same. We are not involved with the Commission's order denying the increase. We are limited to the propriety and validity of a conditional rate refund order, which order was tacitly or impliedly (by withdrawal of objection) accepted by the carriers, plaintiffs herein.

13. We have considered United States v. I. C. C., 337 U. S. 426, 69 S. Ct. 1410 (1949). The Supreme Court was there speaking of a wholly different kind of case. That had to do with statutory reparations. It was correctly held to be an action only for the collection of money.

IV.

All of the parties appear to be in agreement that the relevant statutory provisions do not vest the Commission with authority to order the payment of refunds. The basic statute, 49 U. S. C. § 316 *et. seq.*, requires motor carriers to establish "just and reasonable rates" to be charged to shippers of goods. These rates are established by filing with the Commission tariffs setting forth the rates, fares and charges to be applied and the publishing of these in accordance with the rules of the Commission. These rates go into effect unless the Commission suspends, cancels or otherwise prevents their becoming effective, and upon their becoming effective they become legal if not lawful rates.

There are remedies provided to aggrieved shippers. Indeed, the Commission itself under Section 216(g) of the Act, 49 U. S. C. § 316(g), may on its own initiative enter into a hearing concerning the lawfulness of the rate, fare, charge, etc. Pending such a hearing the Commission may from time to time suspend the operation of such schedule.

It is to be noted that there is a refund provision applicable to railroads. This is § 15(7) of the Act, 49 U. S. C. § 15(7). No similar provision is found in § 216(g) of the Act granting this kind of express authority with respect to the rates of motor carriers.

Similarly, under Part I of the Act there is a reparations procedure applicable to railroads, 49 U. S. C. §§ 8 and 9. Here there is, however, a procedure applicable to motor carriers, although it has not been invoked in the present case. This measure was adopted in 1965, and prior thereto the Commission had fashioned a reparations procedure without the aid of a Congressional statute. They based it on the theory that a common law remedy survived the passage of the Interstate Commerce Act. The court in which the action was brought referred the issue of the unreasonable-

ness of the rates to the Commission. However, the Supreme Court voided this procedure in the case of *T. I. M. E., Inc.* v. *United States,* 359 U. S. 464, 79 S. Ct. 904, 3 L. Ed. 2d 952 (1959). It was held in the *T.I.M.E.* case that Part II of the Interstate Commerce Act gave no right to past unreasonableness of rates. Thereupon, Congress amended Part II of the Act so as to restore the reparations procedure which had obtained prior to the Supreme Court decision.[14] Under this the Commission had the authority to make an after-the-fact determination as to whether past rates alleged to be unlawful were indeed injust and unreasonable, and also to determine the extent of the unreasonableness.[15]

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14. The amendment is set forth in 49 U. S. C. § 304a(2), (5). Although the amendment does not explicitly set forth the procedure to be used in awarding reparations, the legislative history makes it clear that Congress intended to restore the procedure formerly utilized by the Commission pursuant to the policies which it articulated in Bell Potato Chip Co. v. Aberdeen Truck Line, et al., 43 M. C. C. 337 (1944).

For example, the House Committee report states:

> In effect, these sections would permit a court of competent jurisdiction to award reparations to persons injured through violations of the Interstate Commerce Act by motor carriers and freight forwarders subject thereto. This would be accomplished in accordance with established judicial reference procedures under which the Commission would be called upon to aid the court by making necessary administrative determinations relating to the amount of reparations. This would restore a procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by its decision in the *T.I.M.E.* case. . . .

H. R. Rep. No. 253, 89th Cong., 1st Sess. 12 (1965)—Report to accompany H. R. 5401. *See also* S. Rep. No. 387, 89th Cong., 1st Sess. 8 (1965)—Report of the Committee on Commerce to accompany S. 1727. For legislative history see 2 *U. S. Code Cong. & Adm. News* 2923 (1965).

15. 49 U. S. C. §§ 304a(2), (5) and 316(e).

It is abundantly clear, therefore, that Congress has not authorized the Commission to order refunds as a generally accepted procedure. It is also clear, however, that the Commission did not undertake to exercise any such power nor is this a reparations proceeding such as that which was condemned in the *T.I.M.E.* case. Indeed, we do not view the present action of the Commission as an effort to exercise *any* general authority. The order in question was instead issued incident to a request for a continuance and indeed was not unlike the exercise of the suspension power which the Commission has and had under 49 U. S. C. § 316(g). No doubt the Commission could have ordered the rates suspended at least for a period of time (seven months).

It is strongly suggested that there is a *common law* power of restitution here, and in support of that the Government cites *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80 (1943). However, there the Securities Exchange Commission was empowered to consider equitable principles in making its decision. As we view it, a legislative tribunal cannot exercise common law or equity jurisdiction unless this authority is expressly granted by the Congress. But in the present case the Commission did not undertake to apply substantive common law or equity principles. The matter with which it was concerned, that is the granting of an extension of time, was purely procedural. A specific grant of equity jurisdiction was not therefore essential to the imposition of this condition.

An even stronger argument for refusal to annul the Commission's order is the doctrine of equitable estoppel. We have in mind the principle which imposes an obligation on a person to live up to his representations or conduct in circumstances where inequitable consequences would result to persons having the right to rely, and who in good faith

did rely on the representations made.[16] Applied to the case at bar the Commission certainly relied on the carriers' withdrawal of their jurisdictional objection to the refund condition. The Commission's reliance was evidenced by its failure to vacate the order. It did not have to anticipate that the carriers would renege. The carriers' withdrawal of their timely objection was a positive act which evidenced willingness to go along with the condition imposed.

It can also be argued that there was a binding waiver on the part of the carriers resulting from their affirmative withdrawal of their objection. A principle similar to this was applied in *Texaco, Inc.* v. *FPC*, 290 F. 2d 149 (5th Cir. 1961), where gas producers sought to have refund conditions vacated in temporary certificates of public convenience and necessity, which certificates had been awarded by the FPC. Here the producers had not contested the refund provisions at the time of the awards, but only after the FPC required that they be paid. In denying relief to the producers the court stated that the time for the producers to raise the question was before they accepted the certificates with the conditions attached. The FPC had general refund authority, but it does not appear from a reading of the case that they were exercising it in this instance, and the court's decision appears to have been based on the conditional issuance of the certificates.

The Court of Appeals for the Eighth Circuit has recently decided a case which is somewhat analogous to that at bar. *Middlewest Motor Freight Bureau, et al.* v. *United States*, No. 19,870 (8th Cir., October 6, 1970). The question was whether shippers were entitled to *restitution* from carriers

16. Robinson v. Comm'r of Internal Revenue, 100 F. 2d 847, 849 (6th Cir. 1939). There are, of course, narrower definitions of the concept.

for rates charged during the existence of a court-imposed temporary restraining order, which restraining order prevented the operation of a Commission order cancelling carrier rates which were determined by the Commission as not shown to be just and reasonable. Although the Court of Appeals, requiring restitution in that case, viewed the power of the court to order restitution as concomitant with the traditional equity powers of the court to issue injunctions, it also held a rate that is not shown to be just and reasonable to be unlawful, at least from the time the Commission orders it cancelled. The court stated that requiring the shippers to resort to the statutory reparations procedure was requiring double litigation which was an unwarranted burden on the Commission's resources. The court further noted that allowing restitution was not permitting the Commission to accomplish indirectly what it could not accomplish directly, but was merely giving effect to the Commission's order of cancellation—an order which was clearly within its power. These latter considerations seem particularly applicable to our case.

We are unable in good conscience, in view of the circumstances presented, to annul the order of the Commission. The Commission was acting in good faith in granting the extension, and the carriers were at the time agreeable to acceptance of the benefits of such an extension order. Their present posture appears to us to be grossly inequitable and not deserving of court intervention. While we do not commend the procedure as one which should be or could be practiced; we do hold that the peculiar facts of this case, arising as they did, are such as to not justify the granting of the relief requested, namely annulment of the Commission's order and approval of the carriers' conduct.

The practical effect of this ruling is not before us since this is not an enforcement proceeding.

We conclude that the complaint and the cause of action herein be and the same are hereby dismissed.

Dated at Denver, Colorado, this 14th day of January, A. D. 1971.

By the Court:

/s/ David T. Lewis
David T. Lewis
Chief Judge
United States Court of Appeals

/s/ Ewing T. Kerr
Ewing T. Kerr
Judge
United States District Court

/s/ William E. Doyle
William E. Doyle
Judge
United States District Court

Appendix C (2)

No. 70-157. ADMIRAL-MERCHANTS MOTOR FREIGHT, Inc., et al., Appellants, v. UNITED STATES, et al.

404 US 802, 30 L Ed 2d 37, 92 S Ct 51.

October 12, 1971. Appeal from the United States District Court for the District of Colorado. Judgment affirmed.

Same case below, 321 F Supp 353.

Appendix C (3)

No. 70-157. ADMIRAL-MERCHANTS MOTOR FREIGHT, Inc., et al., Appellants, v. UNITED STATES et al.

404 US 987, 30 L Ed 2d 371, 92 S Ct 443.

December 7, 1971. Petition for rehearing denied.

Former Decision, 404 US 802, 30 L Ed 2d 37, 92 S Ct 51.

APPENDIX D(1)

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

S. S. KRESGE CO.	)	
	)	Civil Action
v.	)	No. 34887
	)	
A & B TRANSFER, INC., et al.	)	

MEMORANDUM AND ORDER
[June 30, 1972]

This is an action to enforce an order of the Interstate Commerce Commission. Jurisdiction is vested in the U. S. District Courts by 28 U.S.C. §1336. Further jurisdictional support for the posture of the plaintiff herein may be found in *Admiral-Merchants Motor Freight, Inc., et al v. United States,* 321 F. Supp. 353 (1971), aff'd *per curiam,* 92 S. Ct. 51, reh. den. 92 S. Ct. 443 (1971), where the District Court noted that §17(9) of Part I of the Interstate Commerce Act, 49 U.S.C. §17(9), is made applicable to Part II of the Interstate Commerce Act (Motor Carrier Act) by §§204(g) and (h).

During pendency of the *Admiral-Merchants* case, supra, in the U. S. District Court for Colorado, the parties to the instant case agreed to adjournments until the Colorado action was settled, because of the similarity of issues. The U. S. District Court's opinion in that case dismissed

the challenge to the I.C.C. order, and it is largely on the basis of that disposition that the plaintiff moves for summary judgment in the instant case. Plaintiff contends that there are no genuine issues of fact and that the only thing left to be decided is the amount owed by each defendant to plaintiff – the determination of such amount plaintiff would have viewed not as an issue of fact but as a matter of the administration of the order. Plaintiff also asserts that since the order in this case is the same as the order in the Colorado case, questions pertaining to the validity and enforceability of the order are res judicata and cannot be raised and litigated by the defendants here.

The defendants oppose the plaintiff's motion for summary judgment and move that the suit be dismissed in their favor. The defendants have engaged in elaborate efforts to construe the case law in support of their contentions that this Court lacks jurisdiction, that no claim has been stated upon which relief can be granted, and that no remedy such as is sought in this case is afforded against motor carriers. The defendants fail, however, to state any compelling reason why the decision of the Court in *Admiral-Merchants Motor Freight*, supra, is not res judicata. Many of the defendants herein were parties to the action in the U.S. District Court for Colorado where this same order was contested. And since it is settled law that res judicata may be raised under the provisions of Rule 12 or Rule 56 of the F.R.C.P. during the pleading stage, *Moore's Federal Practice*, Vol 1B, pp. 951-55, and cases cited therein, the plaintiff's motion for summary judgment must be granted.

The defendants assert that though the Colorado Court found the position of the motor carriers to be inequitable on the facts presented, it refused to rule on the enforceability to the Commission's purported refund requirement. A ruling on enforceability was not necessary to a disposition of the Colorado suit, but inasmuch as the cause of action has now been adjudicated and inasmuch as the Commission's order clearly implies that the rates and

charges in question were unjust and unreasonable, the defendants' argument must be rejected.[1]

The defendants further contend that the refund language lacks a specific date on or before which it is to be complied with and that Congress intended that a carrier not be required to pay monies until expiration of a time period stated in the Commission's order. *Missouri Pac. R.R. v. Austin*, 292 F.2d 415 (5th Cir. 1961); *Railroad Yardmaster v. Indiana Harbor Belt R.R.*, 166 F.2d 326 (7th Cir. 1948). The two cases cited above by defendants deal with rail carriers, not motor carriers – as does this case. It should be noted that the defendants sought to make much of the statutory distinction between rail and motor carriers when they attacked this Court's jurisdiction.[2] This Court is of the

[1]In June 1969 the Interstate Commerce Commission ordered carriers with whom plaintiff Kresge had done business in the Middlewest Motor Freight Bureau to make refunds to Kresge respecting several tariffs. This order was amended in August 1969 to require Kresge to present its claims to the carriers supported by paid freight bills or other appropriate evidence. This Court finds that the plaintiff has complied with the requirement of "presenting" the claims to the carriers by means of its communications with the Middlewest Motor Freight Bureau and carriers' counsel. Plaintiff has complied with the requirement of "other appropriate evidence" by way of the affidavit of Mr. Ray Braden. According to plaintiff, it has accumulated, at the expense of over $35,000, copies of the freight bills covered by the order; the copies are in the Detroit offices of the plaintiff. This Court agrees with plaintiff that defendants' counsel or other representative should be required to come to the plaintiff's office to review and verify them, rather than thrusting upon the plaintiff the inequitable burden and further expense of moving them from place to place.

[2]In disputing the Court's jurisdiction, the defendants asserted that there is no cause of action completing the vesting of jurisdiction in the federal courts. They contended that though Part I of the Interstate Commerce Act relating to railroads contains a provision (49 U.S.C. §16) for enforcement of Commission orders for the payment of money, Part II of the Act relating to motor carriers, such as the defendants, contains no similar provision. *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959). But subsequent to the *T.I.M.E.* case, on which defendants rely, Congress amended Part II in order to restore the reparations procedure that obtained prior to the Supreme Court decision. See *Admiral-Merchants Freight, Inc.*, supra, fn. 14 et seq.

view that since Congress empowered the Commission to render an order such as we have in the instant case, and vested jurisdiction in the U. S. District Courts to see that it is carried out, the technical requirements sought by the defendants must be rejected. Indeed, were it otherwise, the apparent intent of Congress would be frustrated.

There are no significant or material factual disputes; nor does the defendants' position find support in law. Therefore, plaintiff's motion for summary judgment is granted.

DAMON J. KEITH
U. S. DISTRICT JUDGE

DATED: 6/30/72

A True Copy
Frederick W. Johnson, Clerk
By Melvin Davis
Deputy Clerk

D-5

[July 27, 1972]
(Title of Court and Cause)
SUMMARY JUDGMENT ORDER

A motion having been made by the plaintiff herein for summary judgment for the relief demanded in the Complaint on the grounds that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law,

Now, on considering the Affidavit of Ray Braden, the exhibits, the pleadings, and all the papers and proceedings heretofore had herein, and the Court having heard the argument of counsel, and due deliberation having been had thereon,

I find that:

1. This Court has jurisdiction over the subject matter and the parties, and the venue is proper.

2. There is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law.

3. The Order of the Interstate Commerce Commission in Docket No. 34971 dated June 5, 1969, August 29, 1969 and October 27, 1969 is a final order and is entitled to enforcement.

4. Plaintiff has presented its claims to defendants supported by paid freight bills.

5. The defendants or their representatives should have 30 days from the date of this order to examine and verify the paid freight bills in the offices of plaintiff at 2727 Second Avenue, Detroit, Michigan.

6. Plaintiff shall not be required to remove these paid freight bills from its aforesaid offices, but defendants' representatives may copy, at their expense, any such bills which they choose.

7. Defendants shall make payment to plaintiff within 45 days of the date of this order of the amounts which the paid freight bills in the custody of plaintiff verify.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

A. That the representatives of defendants shall appear at the offices of plaintiff at 2727 Second Avenue, Detroit, Michigan within 30 days hereof to verify the amounts shown to be owing to plaintiff by way of paid freight bills.

B. That these said defendants shall make payment to plaintiff within 45 days of this order of those amounts verified by the paid freight bills as aforesaid.

/s/ DAMON J. KEITH
U.S. District Judge

Date: 7/27/72

APPENDIX D(2)

No. 72-1967

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

S. S. KRESGE COMPANY, *Plaintiff-Appellee,*	)	APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.
A & B TRANSFER, INC., et al. *Defendants-Appellants.*	)	

Decided and Filed December 5, 1973.

Before: PECK, McCREE and MILLER, Circuit Judges.

PECK, J. delivered the opinion of the Court, in which McCree, J., joined. Miller, J., (pp. 7-13) filed a dissenting opinion.

PECK, Circuit Judge. This is an appeal from an order granting summary judgment in favor of the plaintiff-shipper, S. S. Kresge, in an action against A & B Transfer, Inc., and a number of other motor carriers engaged in interstate commerce. In the District Court, Kresge sought enforcement of an Interstate Commerce Commission refund order, upheld by a three-judge district court in *Admiral-Merchants Motor Freight, Inc., et al. v. United States and the Interstate Commerce Commission,* 321 F.Supp. 353 (D. Colo. 1971), *aff'd mem.*, 404 U.S. 802 (1971), *reh. denied,* 404 U.S. 987 (1971). It alleged that the decision in *Admiral-Merchants, supra,* was res judicata on all issues except the amount of damages. Because of the complexity of this case, we set out the facts in some detail.

The defendants-appellants, all motor carriers in interstate commerce, are members of the Middlewest Motor Freight Bureau[1] and participate in its published tariffs. In early 1968 the Bureau published new rates to be effective in thirty days.[2] Initially, the Commission raised no objection to the increased rates and allowed them to take effect on April 1, 1968. But after receiving complaints from shippers, the Commission scheduled a hearing on the lawfulness of the rates for May 20, 1968. The Department of Transportation and the General Services Administration, both of which had opposed the rate increases, requested that the Commission postpone the hearing for ninety days so that each agency could adequately prepare for the proceedings. The carriers later joined in that request.

The Commission by its order of April 25, 1968, granted the request but conditioned the extension on the agreement of the carriers to comply with a refund provision:

> "*It is further ordered,* That the time for filing the requested information and supporting data be, and, it is hereby extended to August 5, 1968; that the hearing be, and, it is hereby postponed to August 19, 1968, conditioned upon respondents compliance with the refund provision ordered below * * *.
>
> "*And it is further ordered,* That respondents be and, they are hereby, ordered to make refunds to the shippers on any shipment moving after May 20, 1968, to the extent that the increases or any portion thereof under investigation herein are not approved by the Commission."

---

[1]The Middlewest Freight Bureau is a rate publishing agent for interstate motor carriers having regular routes and which operate in the middle western states. The Bureau also compiles statistical data which are presented to the ICC in support of tariff changes.

[2]Section 217 of the Interstate Commerce Act, 49 U.S.C. §317(c), requires interstate motor carriers to notify the Commission 30 days prior to any change in rates. The ICC may then allow the rates to take effect without objection, allow the rates to take effect but order a hearing on their lawfulness, or suspend the rates for up to seven months and in the interim hold a hearing on the lawfulness of the rates. 49 U.S.C. §316(g).

On May 1, 1968, the carriers petitioned the Commission to reconsider the refund portion of the order of April 25, and raised several objections to its legality. However, the carriers later withdrew their objections, apparently because they needed the ninety-day extension to compile the necessary data for the hearing. *Admiral-Merchants Motor Freight, Inc. v. United States, supra,* at 356. As a result, the order of April 25 stood without protest. The Commission held the hearing on August 19, 1968, and issued its findings on June 5, 1969. It found that the carriers had not shown the increased rates to be "just and reasonable," ordered them cancelled and:

> "*further ordered,* That, in accordance with the order entered herein on April 25, 1968, the respondents be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases herein found not shown to be just and reasonable."

The Bureau then petitioned the Commission either to vacate or reconsider its refund order or to reopen the proceedings for a further hearing. At the same time that the carriers notified the Commission that they would cancel the disputed rates as of August 31, 1969, they also gave the Commission notice of new increased rates to take effect on September 1, 1969. On August 29, 1969, the Commission declined to suspend or investigate the new increases and also denied the carriers' petition to reconsider the refund order. Furthermore, the Commission ordered:

> "that the respondents will hereinafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence." I.C.C. Docket No. 34,971, Order of August 29, 1969.

Finally, on October 27, 1969, the Commission denied the carriers' second petition for reconsideration of the refund order.

The carriers then sought an injunction against enforcement of the refund order. (*See* Interstate Commerce Act, §§17(9) & 205(h), 49 U.S.C. §§17(9) & 305(h)). A three-judge district court was empaneled to hear the case pursuant to 28 U.S.C. §§2235 and 2284. (*Admiral-Merchants, supra.*)

The three-judge district court found that although the refund order was valid, it was nevertheless not based on the Commission's statutory authority, but rather constituted a procedural device – a condition which the Commission could lawfully append to its grant of a postponement of the hearing. Since the carriers had impliedly agreed to this procedure – by withdrawing their objections – they were estopped from later contesting the validity of the order:

> "It is abundantly clear, therefore, that Congress has not authorized the Commission to order refunds as a generally accepted procedure. It is also clear, however, that the Commission did not undertake to exercise any such power nor is this a reparations proceeding such as that which was condemned in the T.I.M.E. case. Indeed, we do not view the present action of the Commission as an effort to exercise any general authority. The order in question was instead issued incident to a request for a continuance and indeed was not unlike the exercise of the suspension power which the Commission has and had under 49 U.S.C. §316(g). No doubt the Commission could have ordered the rates suspended at least for a period of time (seven months).
>
> "An even stronger argument for refusal to annul the Commission's order is the doctrine of equitable estoppel. We have in mind the principle which imposes an obligation on a person to live up to his representations or conduct in circumstances where inequitable consequences would result to persons having the right to rely, and who in good faith did rely on the representations made. Applied to the case at bar the Commission certainly relied on the carriers' withdrawal of their jurisdictional objection to the refund condition. The Commission's reliance was evidenced by its failure to vacate the order. It did not have to anticipate that the carriers would renege. The carriers' withdrawal of their timely objection was a positive act which evidenced willingness to go along with the condition imposed.
>
> "We are unable in good conscience, in view of the circumstances presented, to annul the order of the Commission. The Commission was acting in good faith in

granting the extension, and the carriers were at the time agreeable to acceptance of the benefits of such an extension order. Their present posture appears to us to be grossly inequitable and not deserving of court intervention. While we do not commend the procedure as one which should be or could be practiced, we do hold that the peculiar facts of this case, arising as they did, are such as to not justify the granting of the relief requested, namely annulment of the Commission's order and approval of the carriers' conduct." [Footnotes omitted.] 321 F. Supp. at 359-360.

The present action for refunds was brought by Kresge against those members of the Middlewest Motor Freight Bureau with whom it did business between May 20, 1968, and June 5, 1969. Kresge moved for summary judgment, contending that since the Supreme Court had affirmed the opinion of the three-judge district court, nothing remained for the District Court here but to order enforcement and determine the amount of damages. The District Court found no "significant or material factual disputes" between the parties, granted the motion for summary judgment, citing *Admiral-Merchants* as res judicata on the question of whether the cause of action asserted by the plaintiff properly entitled it to the relief sought. As a result the defendants were ordered to examine the plaintiff's freight invoices and make a refund in accordance with the ICC order of June 5, 1969. The present appeal by the defendant carriers is from that order.

To resolve the instant appeal we turn to a recent Seventh Circuit case which resolved similar appeals before it regarding enforcement proceedings founded on the same Colorado three-judge district court's judgment and affirmed those cases in favor of the plaintiff-shipper by holding that the shipper did have a statutory cause of action under §§16(2) and 205(g) of the Interstate Commerce Act, 49 U.S.C. §§16(2) and 305(g). *Aluminum Company of America v. Admiral Merchants Motor Freight, Inc.*, No. 72-1264 (7th Cir. July 12, 1973). We are persuaded by that Court's opinion and adopt its reasoning as dispositive of the issues presented by the appeal before us.

Accordingly, the judgment of the District Court is affirmed.

MILLER, Circuit Judge, dissenting. Respectfully, I must dissent. The Interstate Commerce Act, as originally passed in 1887, established a scheme for the regulation of the nation's railroads. 24 Stat. 379. In 1935 the Act was amended to give the Commission regulatory authority over motor carriers as well. 49 Stat. 543. At the time of the 1935 amendment, Congress labeled the sections regulating railroads as Part I, 49 U.S.C. §§1 et seq., and the sections regulating motor carriers as Part II, 49 U.S.C. §§301 et seq. Though many sections of Parts I and II are parallel, there are significant differences, particularly with reference to the private remedies available to shippers.

Part I provides for both refunds, §15(7), 49 U.S.C. §15(7), and reparations,[1] §§13 and 16, 49 U.S.C. §§13 and 16. Part II, on the other hand, contains no statutory refund procedure and was only recently amended (in 1965) to permit reparations. Interstate Commerce Act §204a,[2] 79 Stat. 651, 49 U.S.C.

[1] "Refunds" and "reparations", as they are used in the Interstate Commerce Act are words of art. Under §15(7), 49 U.S.C. §15(7) the Commission may require a carrier which has increased its rates to keep accurate accounts of "all amounts received by reason of such increase." After the hearing the Commission may order the carrier "to *refund*, with interest, to the persons in whose behalf such amounts were paid, such portion of the increased rates or charges as by its decision shall be found not justified." (Emphasis added).

Under the reparations procedure any aggrieved party may make a complaint to the ICC "of anything done or omitted to be done by any common carrier subject to the provisions of this chapter . . . ." 49 U.S.C. §13(1). The Commission may then investigate and, if it finds a violation by the carrier, it will "make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." 49 U.S.C. §16(1). There are a number of illegal activities that will give rise to a complaint for reparations, including: unreasonable charges, *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U.S. 654 (1931), and discrimination by a carrier against or in favor of certain shippers, *Pennsylvania R. Co. v. Weber*, 257 U.S. 85 (1921).

[2] Sec. 204a reads in pertinent part:

(2) For recovery of reparations, action at law shall be begun against common carriers by motor vehicle subject to this chapter within two years from the time the cause of action accrues, and not after, and for recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this part within three years from the time the cause of action accrues, and not after, subject to paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

* * *

(5) The term "reparations" as used in this section means damage resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in section 316(a) of this title, finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.

§304a. Moreover, the remedies of the shipper seeking reparations under §204a are more limited than those available under its Part I counterpart, §16(2).[3] For example, only §16(2) permits a successful plaintiff to recover attorney's fees. Although the original purpose of §16(2) was to provide a right of action for shippers by railroad to obtain reparations, *T.I.M.E. v. United States*, 359 U.S. 464 (1959), the language of the section is broad and refers to "an order for the payment of money."

[3] Sec. 16(2) reads as follows:

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

The appellees argue that the cause of action granted by §16(2) to any person for whose benefit the Commission has ordered the payment of money is incorporated into Part II of the Act by §205(g).[4] Therefore, since the refund order of June 5, 1969, was a final order under Part II, the beneficiaries of that order should have a cause of action for enforcement under §16(2). In response, appellants contend, firstly, that the United States Supreme Court in *T.I.M.E. v. United States, supra*, held that §16 was not applicable to the Motor Carrier Act and, secondly, that no action since that time, either judicial or legislative, has altered that holding.

In *T.I.M.E.* an interstate shipper contended that the rates it paid, even though in accordance with the published tariffs, were unreasonable because the through rate exceeded the sum of the rates charged for the shorter trips along the route. Two theories were advanced by the shipper: first, it was argued that the statutory duty of a motor carrier to establish reasonable rates, Interstate Commerce Act §§216(b), (d), 49 U.S.C. §§316(b), (d), implies a private right of action for those persons damaged by unreasonable rates; and second, that the Act preserves the common law action for the recovery of exorbitant rates charged by common carriers. Under both theories the question of the reasonableness of the rates would be referred to the Interstate Commerce Commission.

The Supreme Court rejected both theories. What the shippers requested through their alleged statutory cause of action was, in effect, reparations – a remedy expressly provided for in Part I but not then in Part II:

> The very provisions of Part I, and their counterparts in Part II, which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that right are conspicuously absent in the Motor Carrier Act.

[4] Sec. 205(g) provides:

> Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title.

> Thus, where §8 of Part I provides that "any common carrier subject to the provisions of this chapter [who] shall do . . . any act . . . in this chapter . . . declared to be unlawful . . . shall be liable to the person or persons injured thereby for the full amount of the damages sustained . . . ," Part II has no comparable provision. Again, whereas §9 of Part I gives an injured shipper the right to sue in the I.C.C. or in the Federal District Court, Part II contains no comparable provision. *In addition, §§13(1) and 16 of Part I give a shipper claiming reparation the right to proceed in the Commission and to enforce his reparation award in the courts, and Part II contains no comparable provisions.* 359 U.S. at 470-471 (emphasis added).

The Court decided that these omissions manifested Congress's intent not to provide shippers by motor carrier all of the remedies enjoyed by railroad shippers. Further support for this conclusion was seen by the Court in consistent rejection by the Congress of legislation that would have added to Part II sections similar to 8, 9, 13 and 16. 359 U.S. at 471-472.

No common law action for recovery of unreasonable rates was found to survive adoption of the Motor Carrier Act because such a remedy would have been inconsistent with the statute. Since the question of whether the rates were unreasonable would have to be referred to the Commission, *see Texas & Pacific R. C. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), a common law action for recovery would have permitted in two steps what Congress prohibited in one.

The import of *T.I.M.E.* to the present case is apparent. The Supreme Court found that the remedies available to shippers by rail under §16(2) were not present in the Motor Carrier Act. Consequently, any suggestion that §16(2) is incorporated into Part II must fail unless, subsequent to the decision, Congress has provided for such incorporation.

I am aware that the Seventh Circuit in *Aluminum Company of America v. Admiral Merchants Motor Freight, Inc.*, No. 70C1189 (7th Cir. July 12, 1973) and district courts in the

Eighth Circuit, *see Land O'Lakes, Inc. v. United-Buckingham Freight Lines, Inc.*, 351 F. Supp. 102 (D. Minn. 1972); *Western Electric Co. v. Burlington Truck Lines*, No. 18,471-4 (W.D. Mo. March 6, 1973), have considered claims brought by shippers to enforce the ICC order of June 5, 1969 and have held that the shippers to have a statutory cause of action under §§16(2) and 205(g). These decisions have attempted either to distinguish *T.I.M.E.* or hold it inapplicable in light of Congress having added a reparations section to Part II.

As indicated, in 1965 the Motor Carrier Act was amended by adding §204a, thereby giving shippers by motor carrier a cause of action for reparations. There is no doubt that Congress was cognizant of the *T.I.M.E.* decision, and that the decision was one of the factors that finally prompted the Congress to make an addition to the Act that the Commission had long requested.[5] *See* 2 U.S. Code Cong. & Adm. News, p. 2931 (1965). But Congress did not choose to add this remedy by incorporating into Part II sections of Part I. Instead, it added to Part II a distinct section on reparations – one that is considerably more limited in scope than its Part I counterpart, §16(2). *T.I.M.E.* was, therefore, left undisturbed in its holding that §16 could not be read into Part II. On the contrary, Congress's action would suggest that §204a is the sole remedy under Part II for the enforcement of Commission orders for the payment of money.[6]

In *Aluminum Company of America v. Admiral Merchants Motor Freight, Inc., supra,* the court found *T.I.M.E.* "clearly distinguishable since it involved the shippers' right to reparations not their right to enforce a valid refund order." [Slip opinion at p. 8]. It is true that in *T.I.M.E.* the Court did not

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[5]Both before and after the T.I.M.E. decision the Interstate Commerce Commission has consistently requested that Congress amend the Motor Carrier Act and provide in Part II the broad remedies for reparations and refunds already present in Part I. See Hearings on S. 1310 before the Senate Comm. on Interstate Commerce, 76th Cong., 1st Sess. at 130 (1939); 76 Annual Report of I.C.C. to Congress 203, 204 (1962).

[6]Kresge does not contend that it is entitled to reparations under §204a, nor has it followed the procedure set forth in the statute for obtaining reparations.

have before it a valid order of the Commission; however, it considered the broad question of what remedies were available under Part II and used unequivocal language in stating that the remedies of § 16 were not contained in Part II.

Unfortunately, there is no clear legislative history demonstrating the intent of Congress when it passed § 205(g) as a part of the original Motor Carrier Act in 1935. Senator Wheeler, Chairman of the Senate Interstate Commerce Committee, simply pointed out the language of the section when he described the entire bill to the Senate. 79 Cong. Rec. 5653 (1935). Had Congress desired to incorporate into the Motor Carrier Act the broad statutory remedies under § 16(2), it is reasonable that there would have been some specific explanation of what was intended. Appellants submit that by "relief" in § 205(g), Congress meant "judicial review." *See Charles Nolding Trucking Co. v. United States,* 29 F. Supp. 537, 543 (D. N.J. 1939). It is a plausible explanation, though certainly not conclusive. I only know that nothing in the Act itself, its legislative history, or its subsequent interpretation by the Supreme Court persuades me that Congress incorporated § 16 into the Motor Carrier Act via § 205(g). On that issue *T.I.M.E.* is as valid today as it was in 1959.

Finally, it is important to note that the refund order which the shippers are attempting to enforce did not stem from any statutory power of the Commission. Instead, principles of equitable estoppel and waiver were invoked to uphold its validity. *Admiral-Merchants Motor Freight v. United States, supra.* Nor has it been suggested that the Commission has the statutory authority under Part II to order refunds. In fact, with the exception of § 204a which has its own provisions for enforcement, Part II does not even hint that the ICC may make an order for the payment of money. What the majority has done, therefore, is to breathe into Part II a statutory cause of action to enforce an ICC order which was not issued pursuant to "any general authority." *Admiral-Merchants Motor Freight, Inc. v. United States, supra* at 359. Such a remedy certainly was not anticipated by Congress and this Court should leave to that body the determination of whether the rights and remedies of carriers and shippers under the Motor Carrier Act are to be changed.

The absence of a statutory cause of action would not necessarily leave the shippers without a remedy. The equitable doctrine of restitution seems a more appropriate vehicle for enforcing an order based on waiver and equitable estoppel. The courts of common law and equity have spent centuries fashioning remedies for injustice, and it is to that body of law that the shippers should have turned.[7] By creating a statutory cause of action for the appellees, this Court may have opened a Pandora's box that could be difficult to close.

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[7]Such remedies could be sought in federal court if diversity of citizenship existed; otherwise, in an appropriate state court.